

1 IN THE CIRCUIT COURT FOR THE 11TH JUDICIAL
2 CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

3 GENERAL JURISDICTION DIVISION
4

5 Case No. 00-01706 CA 22

6 LYNN FRENCH,

7 Plaintiff,

8 vs.

9 PHILIP MORRIS INCORPORATED,
10 ("PHILIP MORRIS U.S.A.")
11 R.J. REYNOLDS TOBACCO COMPANY,
12 LORILLARD TOBACCO CO., and
13 BROWN & WILLIAMSON TOBACCO
14 CORP., Individually and as Successor
15 to the AMERICAN TOBACCO COMPANY,

16 Defendants.

17 -----X

18 PROCEEDINGS BEFORE
19 THE HONORABLE FREDRICKA SMITH

20 VOLUME 12

21 Wednesday, June 12, 2002

22 1:30 p.m. to 5:50 p.m.

23
24 73 West Flagler Street
25 Courtroom 6-2
 Miami, Florida 33130

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PROCEEDINGS

1
 2
 3 THE COURT: Have a seat, please.
 4 Apparently a few jurors aren't back yet.
 5 How are you doing with the Richmond tape?
 6 MR. TROP: Judge, I see on my desk an
 7 unedited copy, which means they must have
 8 returned this.
 9 I think Rhonda is probably bringing it,
 10 probably why she's delayed.
 11 THE COURT: This is a transcript of part
 12 of Dr. Richmond's deposition.
 13 Okay, I think everyone is ready to resume
 14 with Dr. Torres then, so we'll bring in the
 15 jurors.
 16 MR. REILLY: Could you wait one minute
 17 while I check on the video?
 18 THE COURT: On the tape?
 19 MR. REILLY: We're having it reviewed, I
 20 want to make sure.
 21 Judge, there is one other thing.
 22 THE COURT: Yes.
 23 MR. REILLY: It came to my attention
 24 earlier today that there is a person sitting
 25 in the gallery, but I don't see her here now,

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1 who has been commenting on the testimony of
 2 this witness, for example, and doing it loud
 3 enough for me to hear her.
 4 THE COURT: Where was she sitting?
 5 MR. REILLY: It's a blond lady who has
 6 been sitting in the front row. When the
 7 doctor got up to make presentation, she got up
 8 and stood behind counsel.
 9 MR. MCCUE: That's Mrs. Janoff. She's a
 10 flight attendant going to trial on August 9th
 11 in front of Judge Rothenberg.
 12 MR. WEINSTEIN: She's not our client.
 13 MR. REILLY: I appreciate she's not your
 14 client. And I would appreciate that we have
 15 an admonition that we not speak out or comment
 16 on the testimony.
 17 MR. WEINSTEIN: I haven't heard any
 18 audible sounds.
 19 THE COURT: Well, certainly everyone in
 20 the audience should not say anything so that
 21 the jury can hear. If she comes in, I'll
 22 mention it again. I didn't hear it. But if
 23 you hear it, I'll say that it's been reported
 24 that she was speaking.
 25 MR. WEINSTEIN: It may be that some of

1 his people heard her saying something in the
 2 gallery close by her. Is that it?
 3 MR. REILLY: Actually, I heard her
 4 sitting right here.
 5 MS. WEINSTEIN: I didn't hear her.
 6 MR. REILLY: I also saw her get up and
 7 stand beside the gallery.
 8 THE COURT: I thought she might have been
 9 a relative of Ms. French's.
 10 Is there anyone from the press here? I
 11 just like to know. But nobody is. Okay.
 12 So we're ready now to bring the jury in?
 13 MR. REILLY: Yes, Your Honor. You know
 14 what, I said that -- okay.
 15 (Jury enters courtroom.)
 16 THE COURT: Everyone have a seat. Good
 17 afternoon.
 18 Dr. Torres, you want to please resume the
 19 witness stand.
 20 DIRECT EXAMINATION (CONTINUED)
 21 BY MS. TEDDER:
 22 Q. Good afternoon, Dr. Torres. We will try
 23 to pick up where we left off right before lunch.
 24 And I think at that point we were looking
 25 at -- let's see, I guess I could hand you again, I

1 took from you your copy of the medical records of
 2 Dr. Persky. So I will hand you those again. And
 3 these are again Defendant's Exhibit 1963, which I
 4 understand has been marked for identification as A
 5 281. So here are those records, Dr. Torres.
 6 And I would ask you to turn to page 31 of
 7 those records.
 8 Can we put that up, please, Barb, so the
 9 ladies and gentlemen of the jury can see? Again,
 10 it's difficult to see, but if we could focus that
 11 just a little bit.
 12 That is dated August 31st, 1995; is that
 13 correct, Dr. Torres?
 14 A. Correct.
 15 Q. And can you tell us what does this CT
 16 scan tell us is going on in August of 1995. And if
 17 you could refer us to specific portions there.
 18 Barb can highlight so we can follow along
 19 with what you think is significant in this CT scan.
 20 A. Start by reading paragraph 2 it mention
 21 that the frontal sinuses are clear. Those are the
 22 ones up here in the forehead. There's evidence
 23 that the patient had undergone prior sinus surgery,
 24 they state here 1990, but I believe that was
 25 surgery that was done in 1989. And it says that

1 there was some removal of the anterior ethmoid
 2 cells. Those are the sinuses which are located
 3 here (indicating). As well as performing bilateral
 4 antral windows, that means connection between the
 5 nose and the maxillary sinuses, which are the ones
 6 located here in the eyes (indicating) and the nasal
 7 cavity. They use the term here osteomeatal
 8 complexes bilaterally, which is an unusual wording.
 9 They say mucosal thickening, which means
 10 the lining inside the sinuses is thick in the
 11 inferior and lateral walls of the left maxillary
 12 sinus and the inferior wall of the right maxillary
 13 sinus. And the posterior ethmoid and sphenoid,
 14 which is the one located in the center of the head,
 15 is totally clear.
 16 But they also see bilateral concha
 17 bullosa involving the middle turbinates. Concha
 18 bullosa is when that middle turbinate is very wide
 19 and big and tends to cause a problem with sinusitis
 20 and obstruction.
 21 They have an impression here of
 22 postoperative changes. In other words, they could
 23 see that the patient had undergone an operation in
 24 the sinuses, that there was a thickened mucosa in
 25 the maxillary sinus somewhat greater on the left

1 side than on the right.
 2 Q. All right. Now, one of the things that
 3 you mentioned that you thought was significant and
 4 that that's the bilateral concha bullosa?
 5 A. Yes.
 6 Q. Have you at some point actually reviewed
 7 the actual CT scans from 1995?
 8 A. I reviewed them after I had performed the
 9 independent medical exam.
 10 Q. All right. And I think we have here for
 11 the jury to look at a couple of those CT scans.
 12 And I might ask you again, doctor, if you could to
 13 step down from the -- I have two blow-ups here,
 14 doctor, first of all let me ask you are these the
 15 blow-ups of the CT scan of Mrs. French?
 16 A. Yes, they are.
 17 Q. And I will let you use one or both of
 18 these in the order that you see fit. But can you
 19 tell the jury what we are looking at here and what
 20 we can see on this CT scan.
 21 A. In order to reorient ourselves, the eyes
 22 are right here. Those are the eye sockets.
 23 Now, if you look at the center, this is
 24 the septum, this is cartilage right here. Now, the
 25 other big structures are the maxillary sinus, which

1 are the ones located here.

2 Q. Those in black?

3 A. Right, they are in black, that means that
4 they are full of air, which means that we see a lot
5 of air in the sinuses.

6 Q. Black means air?

7 A. Right. If the color was like this, that
8 would mean there's a blood or infection going on
9 over here. We see the middle turbinates, which is
10 in this case a concha bullosa. Instead of this
11 being solid like I showed before in the diagram of
12 a woman, you can see there's a hollowness there.
13 And you can see that in the posterior part. You
14 can see the hollowness over here. That's what we
15 call concha bullosa. And that is secretions and
16 can cause problems.

17 Q. This is a little bit bigger view, doctor.
18 Can you also see concha bullosa here?

19 A. Yes, you can see it very big here.

20 Q. And Ms. French had bilateral concha
21 bullosa, what does bilateral mean?

22 A. Means she had in the right side and the
23 left side.

24 Q. I think that's probably everything we
25 need to do there if you want to take the stand.

1 of the things you mentioned was scarring. And I
2 noticed that you did not point that out for us on
3 this CT scan?

4 A. Right.

5 Q. You did mention that you had done an exam
6 of Ms. French; is that correct?

7 A. Correct. In order to see the scarring,
8 you don't see that on the X-ray, you see that when
9 you do an endoscopic exam with the instruments I
10 showed you before.

11 Q. We're going to talk about your exam of
12 Ms. French in a few minutes.

13 I wanted to ask you, do you have an
14 opinion to a reasonable degree of medical certainty
15 as to whether or not the secondhand smoke or
16 environmental tobacco smoke as it's been referred
17 to here on airplanes played a role in the
18 development of Ms. French's chronic sinusitis?

19 A. I do not think that environmental tobacco
20 smoke played a role in her chronic sinusitis.

21 Q. Do you know at the time this CT scan was
22 taken in 1995, approximately the last time
23 Ms. French had been exposed to environmental
24 tobacco smoke?

25 A. I believe it was in 1990.

1 I understood from your testimony this
2 morning that it's your opinion that Ms. French
3 developed sinusitis by 1995?

4 A. Correct.

5 Q. Can you tell us what is the level of
6 Ms. French's chronic sinusitis, by that I mean
7 severe, mild, how would you characterize that?

8 A. I would say it's mild.

9 Q. And, doctor, do you have an opinion as to
10 a reasonable degree of medical probability as to
11 the cause of Ms. French's chronic sinusitis?

12 A. Yes, I do.

13 Q. Can you tell us what is that opinion?

14 A. In my opinion, she had a lot of scarring
15 in the right nasal area, in the area of the concha
16 bullosa and the turbinate. She has a very tiny
17 ostium, which is actually what we call an accessory
18 ostium of the sinus, which is not wide enough. And
19 it's not functioning well enough as far as drainage
20 is concerned. That's been impeding proper
21 drainage.

22 And she also has most likely a problem
23 that is contributing to the problem.

24 Q. I want to talk about something you
25 mentioned here just to make a clarification. One

1 Q. And how did you learn that?

2 A. Well, we know that there was a ban on
3 smoking in planes and I'm pretty sure it was in
4 1990.

5 Q. And did you also -- you mentioned your
6 exam of Ms. French, did you discuss the fact that
7 Ms. French was coming to see you in the context of
8 litigation, this case, and the fact that she was
9 claiming --

10 A. Yes.

11 Q. Her illness was caused from the
12 environmental tobacco smoke, correct?

13 A. Correct.

14 Q. What, did you tell us, Dr. Torres?

15 You've kind of outlined for us some things that in
16 your opinion caused Ms. French's chronic sinusitis,
17 can you tell us what's the difference between what
18 caused Ms. French's chronic sinusitis and what
19 causes most people's chronic sinusitis, if
20 anything?

21 A. Well, at this point, after telling her
22 that she doesn't have a lot of drainage after the
23 surgery that was performed on the right side. And
24 because of that she's got an anatomical problem.

25 She also has the scarring or synechia,

1 which is another definition for scarring, that
2 pushing the middle turbinate closer to the area.
3 And the ostium that was supposed to be enlarged in
4 the right side, it was never enlarged or the
5 surgeon only enlarged the left, which is really
6 nonfunctional.

7 Q. We're going to talk about the last thing
8 you mentioned there in just a minute. But I want
9 to go back quickly to the medical records in this
10 case. And I want to talk about Ms. French's
11 medical course with Dr. Persky between 1995 and
12 1999. And I would direct your attention, doctor,
13 to pages, I think about 6, 7 and 8 of Exhibit 1963,
14 the records of Dr. Persky. We're going to take a
15 quick look at those.

16 A. Yes.

17 Q. - Would it be true that Mrs. French's
18 symptoms from your review of those records began to
19 occur with greater frequency in 1995 and forward?

20 A. Yes.

21 Q. Can you tell from your review of those
22 records, does Dr. Persky continue to treat
23 Ms. French with antibiotics during that period?

24 A. He frequently did.

25 Q. And again, antibiotics are prescribed to

1 not to see the patient and not to do a follow up
2 for a period of over two years?

3 A. No, he should be examining this patient
4 and calling the patient in very frequently.

5 Q. I would direct your attention then to
6 page 90, which I think is the very last page of the
7 records. There is an entry on there dated December
8 14th, 2001. And I would ask you if you see that.
9 I think we have that one highlighted here for the
10 jury to look at.

11 A. I see it.

12 Q. December 14th, 2001. Did Dr. Persky in
13 fact see Ms. French on that date?

14 A. Well, there's an indication here that he
15 did a collagen injection, and he saw the patient
16 that day.

17 Q. Again, what is a collagen injection; does
18 that have anything to do with sinusitis?

19 A. No, that is a -- collagen is a cosmetic
20 procedure where you inject this material in
21 wrinkles around the lips or in the eyes just to
22 make the patient look a little better.

23 Q. Doctor, if you had a patient who had a
24 history of these complaints consistent with what
25 Ms. French has and she came to see you for a

1 combat a bacterial component; would that be
2 correct?

3 A. Correct.

4 Q. I would ask you to turn to page 10 of
5 those records and direct your attention to an entry
6 dated October 7th, 1999. Do you see that entry?

7 A. Yes.

8 Q. Now, Dr. Persky testified that this was
9 his last visit with Ms. French for her sinusitis.
10 Does that comport with your review of the records?

11 A. Yes.

12 Q. And can you tell us what do the --
13 subsequent to this October 7th, '99 date, the last
14 time Dr. Persky actually examined her, what do the
15 records reflect has kind of happened since then,
16 between '99 and the present time?

17 A. Well, what the records reflect is that
18 the patient got prescribed over the telephone
19 antibiotics and decongestants without having
20 received a physical examination.

21 Q. And I would ask you, doctor, assume that
22 Dr. Persky has testified in this case that he was
23 aware of the concha bullosa from the 1995 CT scan.
24 In your opinion, doctor, is it normal for a
25 physician who has a patient with a sinus condition

1 collagen injection, I understand you said you don't
2 perform those, but the patient came in to see you,
3 what would you do?

4 A. Well, knowing the history and everything
5 else, it would have been a golden opportunity to
6 inquire to her about her sinus condition and
7 examine her at the same time.

8 Q. And do you see any evidence in the record
9 that that was done on that date?

10 A. No, no evidence.

11 Q. I would ask you to turn now to page 25 of
12 the records and I think that there is an entry
13 there. If we could take a look at that. An entry
14 dated January 4th.

15 Would you put that one up for the jury,
16 Barb?

17 It's very hard to read, but I think that
18 says January 4th, 2000 at the very bottom of that
19 page; do you see that, doctor?

20 A. Yes, I do.

21 Q. Then over on the far right it says need
22 immuno W/U and POSS CT. Can you tell me does that
23 say, possible immunological work up and CT scan?

24 A. Correct.

25 Q. That notation indicates it was

1 recommended in the year 2000, do you see any
 2 evidence from these records that either the immuno
 3 work up or the CT scan were done?
 4 A. No.
 5 Q. Do you agree with that, a CT scan should
 6 be done in this case?
 7 A. Yes.
 8 Q. And why do you think a new CT scan should
 9 be done?
 10 A. Well, if you as the physician, you are
 11 prescribing antibiotics for the patient because the
 12 patient is calling with complaints, you must think
 13 that there's something going on in the sinuses that
 14 needs to be evaluated properly either with a CAT
 15 scan or with an endoscopic examination or with
 16 both.
 17 Q. The records of Dr. Persky we've seen a
 18 number of references in here beginning in 1976
 19 about the need to test Ms. French for allergies.
 20 Do you see any evidence in these records that that
 21 was ever done?
 22 A. It was never done.
 23 Q. And do you agree that Ms. French should
 24 be tested for allergies?
 25 A. I do agree.

1 Q. In March of 2000 Dr. Persky had
 2 Ms. French undergo some additional blood work;
 3 you're familiar with that, or March of 2002, excuse
 4 me.
 5 A. Yes.
 6 Q. Did that blood work include a test for
 7 allergies?
 8 A. No, it did not.
 9 Q. And at that time in March could he have,
 10 is there a test that he could have done, when he
 11 was drawing blood could he have drawn additional
 12 blood for an allergy test?
 13 A. Most definitely.
 14 Q. Doctor, I would ask, are you familiar
 15 with literature that has come out in the last few
 16 years that discusses the over expression of
 17 eosinophil in connection with chronic sinusitis?
 18 A. Yes.
 19 Q. And did the blood work that was performed
 20 in March of 2002, does that relate to that in any
 21 way?
 22 A. Well, the result did not show any of
 23 that.
 24 Q. At some point, Dr. Torres, you mentioned
 25 earlier that you did an examination of Ms. French,

1 correct?
 2 A. Correct.
 3 Q. And that was done at our request; is that
 4 right?
 5 A. Correct.
 6 Q. And can you tell us what did your
 7 examination -- first of all, when was that
 8 examination?
 9 A. October the 5th, 2001.
 10 Q. And what did that examination -- that was
 11 in the context of this litigation, correct?
 12 A. Correct.
 13 Q. And what did that examination consist of?
 14 A. Well, first we had the opportunity to
 15 review whatever records we had available and then
 16 we took a thorough history. She complained present
 17 illness, past medical history, family history,
 18 social history.
 19 And then we did a complete nose and
 20 throat examination, including endoscopic exam.
 21 Q. Did you have the 1995 CT scan that we've
 22 just been looking at when you did that exam?
 23 A. No, I didn't.
 24 Q. Did you have the report from the '95 CT
 25 scan contained in the medical records?

1 A. Yes, I did.
 2 Q. You knew at the time Ms. French came to
 3 see you that she was a flight attendant, correct?
 4 A. Correct.
 5 Q. And she told you that she was claiming
 6 exposure to secondhand smoke caused her to be sick,
 7 correct?
 8 A. Correct.
 9 Q. Can you describe how you performed the
 10 exam and what you found?
 11 A. Well, first we used a nasal speculum to
 12 spray a medication called pheninephrine. Then we
 13 also applied Xylocaine, which is a local
 14 anesthetic.
 15 Then after that we proceeded to use the
 16 flexible endoscope to examine both her right and
 17 left nasal cavities and sinus cavities. Along with
 18 the endoscope, we also examined the nasal pharynx,
 19 the oropharynx, which is the back of the throat and
 20 down into the voice box for the vocal cords. We
 21 also examined her ears and we also examined her
 22 neck.
 23 Q. After your examination of Ms. French, did
 24 you make an assessment of her condition at that
 25 time?

1 A. Yes, I did.
 2 Q. What was your assessment?
 3 A. Well, my assessment was that in the left
 4 nasal sinus area everything look fine. There was
 5 no evidence of sinusitis or abnormalities.
 6 However, in the right nasal cavity I found
 7 scarring, what we call sinicia, which is like an
 8 addition between the turbinates and the lateral
 9 nasal wall.
 10 Q. Can I ask real quick, can we substitute
 11 the word synechia and scarring are the same thing?
 12 A. Yes. I found a very small ostium, which
 13 was in the general area of what we call the
 14 accessory or secondary ostium and had a little bit
 15 of purulent discharge. I could not find a good
 16 connection between the right maxillary sinus and
 17 the nose. And those were my findings.
 18 Q. You said you had found a little bit of
 19 purulent discharge?
 20 A. Yes.
 21 Q. What would that indicate?
 22 A. Well, either an infection that was about
 23 to start or was done.
 24 Q. Did you determine that she has chronic
 25 sinusitis?

1 A. Yes, I did.
 2 Q. Do you have an opinion as to a reasonable
 3 degree of medical probability what's going on with
 4 Ms. French today?
 5 A. Yes, I do.
 6 Q. Can you explain that to us?
 7 A. I think she doesn't have proper drainage
 8 on the right side of her sinuses. The surgery was
 9 not successful on the right side because of that.
 10 And she has poor drainage and the scarring is
 11 interfering with the drainage. And she doesn't
 12 have a good connection between the maxillary sinus
 13 and the nose.
 14 And she probably also has some allergies
 15 that occasionally will flare-up and will contribute
 16 to her overall condition.
 17 Q. I want to put one thing back up here
 18 briefly. And that's this picture where you
 19 explained to us earlier, this is the diagram I
 20 think you said of the sinus. This is the diagram
 21 where you had the two ostium; is that correct?
 22 And I think you told us earlier this was
 23 a natural ostium and this was the accessory ostium;
 24 is that correct?
 25 A. Correct. What you can see is with this

1 area it's not working, then the secretions just
 2 don't go into the accessory or secondary ostium.
 3 You can see the diagram, it shows that nature made
 4 us in such a way that this area must be open either
 5 after a surgery in order for it to work, otherwise,
 6 the drainage is impaired.
 7 Q. Now, when you did your physical exam of
 8 Ms. French with the endoscope, that means you're
 9 looking up in her nose, in her sinuses, correct?
 10 A. Correct.
 11 Q. Did you find her natural ostium on the
 12 right side?
 13 A. No, I couldn't.
 14 Q. I would ask you, doctor, to assume that
 15 Dr. Persky said in his operating report that he
 16 operated on the natural ostia in the right nasal
 17 cavity. Can you tell us in your opinion and in
 18 light of your exam, would that be correct?
 19 A. Well, he described that -- he doesn't
 20 describe what he did in the right side in detail as
 21 compared to what he described in the left side. He
 22 said that he did basically the same thing in both
 23 sides.
 24 Q. Based on your exam, do you believe he
 25 found the natural ostia on the right side?

1 A. Well, if he found it, it's not open
 2 anymore. And most likely what he found was the
 3 accessory ostium and that's basically the exam of
 4 what was done.
 5 The scarring also may have occluded
 6 whatever he did, which can occasionally happen to
 7 any surgeon.
 8 Q. If Dr. Persky did not enlarge the right
 9 natural ostium in her right maxillary sinus, what
 10 effect would the failure to enlarge her natural
 11 ostium have on the development of chronic
 12 sinusitis?
 13 MR. TROP: Objection, Your Honor. We ask
 14 to approach the bench?
 15 (A bench conference occurred as follows:)
 16 MR. TROP: Judge, I object to that
 17 question.
 18 THE COURT: Do you want to just repeat
 19 the question?
 20 MS. TEDDER: The question was: If he
 21 didn't enlarge the natural ostium on her right
 22 maxillary sinus, what effect would that have
 23 on the development of chronic sinusitis?
 24 MR. TROP: Judge, this is supposed to be
 25 a trial without issues of fault. They have

1 spent, on this witness, the last several hours
2 bashing Dr. Persky. In effect, making him a
3 defendant in a multitude of different ways.
4 Now they're asking this witness, well, not
5 only how did Dr. Persky mess up in a variety
6 of different ways, but now what damage did it
7 cause.

8 Judge, we think -- I mean, this is on top
9 of Mr. Reilly's cross examination the other
10 day about the airlines not washing their
11 pillows and all that stuff. They're putting
12 in issues of fault. They put up a wall
13 against any inference that we want to create
14 about something that they've done. So I think
15 this is improper. They're making -- they
16 waived the Fabre defense on the record. They
17 said we have no Fabre parties. Maybe they're
18 taking the position that, well, if we don't
19 put them on the verdict form that's not a
20 Fabre. That's not true, they've created
21 prejudice. And we'd ask for a mistrial based
22 upon these questions.

23 MR. WEINSTEIN: Blaming someone else for
24 her condition.

25 MR. TROP: They're blaming someone else

1 defense, we have no way to defend this.

2 THE COURT: The thing is since they're
3 agreeing that she has chronic sinusitis
4 they're entitled to give an explanation for
5 why she has it. Which isn't the ETS.

6 MR. TROP: But they can't spring that,
7 having waived their Fabre defense and telling
8 us no, we're not blaming any other party and
9 on and on and on about no issues of fault.
10 Then they're trying to sandbag us by blaming
11 another party after they said they weren't
12 going to do it.

13 THE COURT: I suggest that maybe in
14 developing the instructions, you figure out
15 something you want to say about this. Because
16 I think it would be wrong to exclude evidence
17 as to what caused the sinusitis.

18 (The bench conference ended.)

19 BY MS. TEDDER:

20 Q. Dr. Torres, I'd like to go back to where
21 I was. My question was: If Dr. Persky did not
22 enlarge the natural ostium in the right maxillary
23 sinus during surgery, what effect would that have
24 on the development of chronic sinusitis?

25 A. Would have a big effect, because when the

1 for her condition.

2 MS. TEDDER: I think it's perfectly
3 appropriate, Your Honor, to inquire into why
4 this particular woman in his opinion has
5 developed chronic sinusitis.

6 THE COURT: Yeah, I mean, the thing is
7 the issue in this case, the main issue in this
8 case is what caused her chronic sinusitis?
9 That is the issue. So their position is that
10 ETS didn't cause it, it's caused by the
11 anatomical problems, it's caused by what
12 Persky did. It's caused by this and that.

13 MR. WEINSTEIN: But they can't say that a
14 person did it or an entity did it.

15 MR. TROP: If they want to say that a
16 person did it, they didn't come up with this
17 line of defense this morning.

18 THE COURT: I'm going to overrule your
19 objection and deny your motion for a mistrial
20 because I think it's part of their defense
21 that it wasn't caused by ETS.

22 MR. TROP: They waived their --

23 THE COURT: I'm sorry I'm going to listen
24 to him.

25 MR. TROP: They waived their Fabre

1 drainage is compromised that's when the patient
2 develop the chronic sinusitis.

3 Q. Did the concha bullosa that you described
4 seeing on the CT scan play a role in the
5 development of Ms. French's chronic sinusitis?

6 A. I believe it does.

7 Q. And that's because you believe it creates
8 blockage; is that correct?

9 A. Correct, it creates blockage, plus it has
10 a tendency to collect secretions just like an open
11 glass there waiting to get filled with secretions.

12 Q. And after you did your independent
13 medical exam of Ms. French on October 5th, 2001,
14 did you make any recommendations after that to
15 address Ms. French's problems?

16 A. Yes, I did.

17 Q. And can you tell the jury what those
18 recommendations were?

19 A. Well, my recommendation was that she
20 should go back to her physician so that he performs
21 an endoscopic examination so that he examines the
22 results of the surgery performed in the right side.
23 And also a CAT scan would be helpful for him to get
24 additional information. Also I recommended allergy
25 work up.

1 Q. Do any of the things that you indicated
2 are causing Ms. French's problems or caused her
3 chronic sinusitis have anything to do with
4 secondhand smoke?

5 A. No.

6 Q. Do you have an opinion, Dr. Torres, as to
7 what will happen if Ms. French does not do the
8 things that you recommended, the allergy testing,
9 the CT scan, examine this concha bullosa for
10 surgery, et cetera?

11 A. Most likely she will continue to have the
12 same problems.

13 Q. I would like you to assume that
14 Dr. Persky has said he would like to do another
15 exam of Ms. French, would like to have another CT
16 scan done, check her concha bullosa and check for
17 allergies. I take it from your testimony you would
18 agree that all of those things should be done?

19 A. Yes.

20 Q. Is there any reason to delay any of those
21 until after this trial is over?

22 A. Absolutely not.

23 Q. In your opinion, when should those things
24 have been done?

25 A. A long time ago.

1 testified she encountered several hundred people on
2 the plane every day; do you have an estimate of how
3 many of us encounter 200 people when we go to work?

4 A. Not many.

5 Q. I would also ask you to assume that we've
6 had some demonstrations in this trial of how flight
7 attendants handle cups, trays, pass things to
8 passengers, can you tell us how are things like
9 bacteria and viruses transferred from one person to
10 another?

11 A. They are what we call airborne. In other
12 words, if somebody sneezes or blows air or blows
13 their nose or coughs, anything that will make you
14 expel some kind of air, all that will make you
15 expel substances into the environment.

16 Q. Are those things that could collect on,
17 for example, blankets or pillows on an airplane?

18 A. Yes, they can.

19 Q. Do you have any idea how often the
20 blankets or pillows on an airplane are cleaned?

21 MR. TROP: Objection, Your Honor.

22 THE COURT: I'm not sure what your
23 objection is. But I agree that that's not
24 really his expertise.

25 BY MS. TEDDER:

1 MR. TROP: Objection, Your Honor, move to
2 strike on previously stated grounds.

3 THE COURT: I'll deny your motion.

4 BY MS. TEDDER:

5 Q. What was your answer, Dr. Torres?

6 A. That it should not be delayed.

7 Q. Dr. Torres, is tobacco smoke an
8 allergen?

9 A. No.

10 Q. We talked a little bit about some of the
11 causes of chronic sinusitis. I'd like to turn and
12 talk about some of the things that you said are
13 potential culprits, i.e., allergens, bacteria and
14 viruses and talk about that in the context of
15 Ms. French's job as a flight attendant.

16 Viruses, bacteria and fungus, those are
17 some things that you told us about earlier?

18 A. Correct.

19 Q. Are those things that one would find on
20 the airplane?

21 A. Yes.

22 Q. And would a flight attendant encounter
23 more of those things than the average person?

24 A. Most likely, yes.

25 Q. Assume, doctor, that Ms. French has

1 Q. You talked a little bit earlier about
2 barotrauma, correct?

3 A. Correct.

4 Q. Tell us again what barotrauma is.

5 A. It basically means when there's a sudden
6 change in the external pressure, for instance,
7 taking off on a plane and going up, even though the
8 cabins are supposed to be pressurized sometimes
9 that mechanism doesn't work that great and there
10 could be a differential between the pressure in the
11 outside and your sinuses. What that causes is for
12 the sinuses to swell up. Sometimes the patient can
13 actually bleed into the sinus or get inflammatory
14 reaction because of that.

15 Q. Is barotrauma something that a flight
16 attendant would experience?

17 A. Yes.

18 Q. Doctor, can you tell us whether the
19 diagnosis of sinusitis has risen in this country
20 over the last 20 years?

21 A. It has risen dramatically.

22 Q. Do you have any understanding what has
23 happened to the level of smoking in this country in
24 the last 20 years?

25 A. It has decreased.

1 MS. TEDDER: Give me just a few minutes,
 2 Your Honor.
 3 I think that's it, Dr. Torres. Thank
 4 you.
 5 CROSS EXAMINATION
 6 BY MR. TROP:
 7 Q. Good afternoon, Dr. Torres.
 8 A. Good afternoon, sir.
 9 Q. My name is Adam Trop. You and I met once
 10 before at your deposition in May at the Shook Hardy
 11 office; do you remember that?
 12 A. Yes, I do.
 13 Q. We had a chance to say hello to each
 14 other around lunchtime.
 15 A. Yes.
 16 Q. You realize, doctor, that this is a very,
 17 very important case, don't you?
 18 MR. REILLY: Objection, Your Honor.
 19 THE COURT: Sustained.
 20 BY MR. TROP:
 21 Q. Doctor, I want to ask you some questions.
 22 I've got a number of questions about your
 23 examination, your opinions here. But I want to try
 24 to get at some basic facts first. You did a
 25 report, a written report after you examined

1 approach.
 2 THE COURT: Want to approach the bench?
 3 Is it really necessary? Can't we just go
 4 ahead?
 5 Do you have other questions in this line?
 6 MR. TROP: A number.
 7 THE COURT: How about if I just explain
 8 to the jury?
 9 MS. TEDDER: The rules call it an
 10 independent medical examination.
 11 THE COURT: How about if I explain to the
 12 jury what happens here? Is there any
 13 objection?
 14 MR. TROP: I'd like that statement
 15 corrected. It is called --
 16 THE COURT: I'll tell the jury.
 17 When there's any lawsuit when the
 18 plaintiff is claiming personal injuries, such
 19 as in this case, the defendants are entitled
 20 to have a doctor examine the plaintiff. The
 21 defendants choose the doctor. In this case
 22 they chose Dr. Torres. Under our rules,
 23 they're entitled to do that, to have a doctor
 24 of their choice examine the plaintiff.
 25 So then we have everyone come and testify

1 Ms. French?
 2 A. Yes, I did.
 3 Q. And the jury has heard the term before,
 4 but I'm just looking at the very first line, just
 5 something struck me. The patient was referred for
 6 independent medical examination. You see that.
 7 You don't have your report with you?
 8 A. I don't have the report.
 9 Q. You agree that's what it says, the first
 10 line?
 11 A. Yes, but I would have to look at a copy
 12 of the report.
 13 Q. Perhaps counsel has another -- I'm not
 14 going to ask you anything from it now except for
 15 that part, but I'll show it to you.
 16 A. I believe you.
 17 Q. Now, independent medical examination,
 18 that kind of implies that there was some
 19 independence, doesn't it? What does the word
 20 independent mean to you?
 21 A. It means that you don't depend on
 22 anybody.
 23 Q. Means there's no influence on you?
 24 A. Correct.
 25 MS. TEDDER: Objection, Your Honor,

1 in front of jury. So that's what was done.
 2 BY MR. TROP:
 3 Q. You were hired by these lawyers down
 4 here, weren't you, their law firm?
 5 A. Correct.
 6 Q. You mentioned the name Shook Hardy a few
 7 times. That's Mr. Reilly and Ms. Tedder's law
 8 firm, is it not?
 9 A. Correct.
 10 Q. And you know they represent the tobacco
 11 companies, right?
 12 A. Correct.
 13 Q. Unlike Dr. Persky who came in here not
 14 too long ago, you are not the treating doctor of
 15 Ms. French?
 16 A. Right.
 17 Q. You weren't seeing her to help her in any
 18 way, you were seeing her on behalf of the
 19 Defendants to help them, right?
 20 A. Right.
 21 Q. Now, the Defendants, as Judge Smith just
 22 instructed, picked you to examine Ms. French out of
 23 all the otolaryngologists around, right?
 24 A. Right.
 25 Q. And, doctor, when they picked you, up

1 until the point they picked you to examine her, you
 2 had never publicly expressed any opinions, either
 3 in a deposition or in a writing or any kind of
 4 public opinion about secondhand smoke and what it
 5 causes, the effects it causes, correct?
 6 A. Correct.
 7 Q. And you knew that was important to the
 8 Defendants, didn't you?
 9 A. Correct.
 10 Q. They told you it was important that you
 11 hadn't publicly expressed any opinions, correct?
 12 A. Well, I don't recall that statement.
 13 Q. After they contacted, incidentally they
 14 contacted you months and months before you ended up
 15 examining Ms. French, didn't they?
 16 A. A few months before, yes.
 17 Q. And they met with you before you ended up
 18 examining Ms. French; isn't that correct?
 19 A. Yes.
 20 Q. Matter of fact, I think one of the first
 21 things you said on your direct examination when
 22 Ms. Tedder was asking you questions was they
 23 interviewed you, right?
 24 A. Right.
 25 Q. And they met with you, and I say they,

1 the lawyers from this Shook Hardy law firm met with
 2 you, right?
 3 A. Right.
 4 Q. You mentioned a Lorraine O'Neil.
 5 In addition to meeting with you, before
 6 you examined Ms. French or had even seen anything,
 7 they supplied you with some research, did they not?
 8 A. Yes, they did.
 9 Q. The research that they, the lawyers for
 10 the tobacco industry, picked up themselves. They
 11 compiled the research that they thought you should
 12 see and they gave it to you, right?
 13 A. Right.
 14 Q. And they met with you for a number of
 15 hours, didn't they?
 16 A. Yes.
 17 Q. And they of course were paying you, they
 18 knew you were billing and you were billing it
 19 anywhere from 350 an hour to 500 an hour, right?
 20 A. Right.
 21 Q. And after they gave you all this research
 22 and met with you several times, at some point they
 23 got a commitment from you that you don't believe
 24 secondhand smoke causes chronic sinusitis; is that
 25 correct?

1 A. I expressed my opinion, my expert opinion
 2 to that effect.
 3 Q. To that effect, to these lawyers in
 4 private, right?
 5 A. Yes.
 6 Q. And that's when these lawyers, after you
 7 told them that you don't think chronic sinusitis
 8 can be caused by environmental tobacco smoke,
 9 that's when they asked you to examine Ms. French
 10 and arrive at an opinion whether her chronic
 11 sinusitis was caused by secondhand smoke, right?
 12 A. I formulated my experience not only based
 13 on those meetings, but also on my independent
 14 research and vast experience of 19 years of
 15 treating patients who smoke and don't smoke and
 16 have sinusitis or don't have sinusitis.
 17 Q. Right. But my question was whether,
 18 regardless of how you arrived at this independent
 19 opinion you have, they made sure they knew your
 20 opinion and that you were firm on it before they
 21 asked to you examine Ms. French, right?
 22 A. Yes.
 23 Q. Now, you know of course that the central
 24 issue in this case is -- she has chronic sinusitis,
 25 right?

1 A. Right.
 2 Q. You know the issue in this trial is, did
 3 secondhand smoke cause it, right? You know that?
 4 A. Yes.
 5 Q. So they go and send you, send her to this
 6 independent medical examination when they knew
 7 there's no possible way you were going to say that
 8 secondhand smoke caused her chronic sinusitis; is
 9 that correct?
 10 A. That's incorrect.
 11 Q. Oh, that is incorrect?
 12 A. Correct.
 13 Q. Oh, I thought you just --
 14 MR. REILLY: Objection, Your Honor.
 15 Argumentative.
 16 THE COURT: Okay, he answered. And then
 17 you ask your next question.
 18 MR. TROP: I'm sorry, judge.
 19 THE COURT: But, would you mind please
 20 having Ms. Tedder make the objections. The
 21 person who takes the witness usually makes the
 22 objections.
 23 BY MR. TROP:
 24 Q. I thought you just said that in your
 25 opinion, you arrived at the opinion that secondhand

1 smoke did not cause chronic sinusitis?

2 A. In this particular patient, after I had
3 the opportunity to review the records, okay, and
4 after I had the opportunity to review everything
5 involving the case, it's my opinion that secondary
6 smoking has nothing to do with the problem with
7 chronic sinusitis.

8 Q. Right, in anybody, right, that's your
9 opinion?

10 A. That's my opinion.

11 Q. So they knew when they sent her to you
12 that that was going to be your opinion?

13 A. Well, I made clear that the findings
14 pertinent to the case would somehow -- in other
15 words, the secondary smoking in my opinion had
16 nothing to do -- in fact, that point they sent the
17 case, I cannot remember exactly the time frame.

18 Q. You know, we had a lot of sporting
19 events -- I don't know if you're a sports fan,
20 doctor. We had that Tyson fight, NBA finals,
21 right, this weekend. We had that horse race, the
22 Belmonte. Right? This weekend, did you see any of
23 that?

24 A. No, I don't do that. I do medical
25 missionary work in my free time.

1 A. An hour.

2 Q. And of course you billed for your time
3 for doing that, right?

4 A. Yes, sir.

5 Q. I have asked for and been given copies of
6 some of your bills. And I'd just like to go over
7 some of them. How much do you charge for examining
8 a person like Ms. French for, well for the tobacco
9 companies?

10 A. For the IME I charge \$250.

11 Q. \$250.

12 A. \$350.

13 Q. And that exam was on October 5th of 2001?

14 A. Correct.

15 Q. Maybe we can make that a little smaller.
16 Not that small. That's good.

17 So is that a copy of the bill that you
18 rendered for your examination?

19 A. Yes.

20 Q. And it shows \$250 for the report down
21 there at the bottom, right?

22 A. Yes.

23 Q. And then for the IME, which is the actual
24 examination, that's \$350?

25 A. Yes.

1 Q. Okay, you don't watch sports. Many
2 people do watch sports. There's nothing wrong with
3 that.

4 They rigged this examination, did they
5 not?

6 MS. TEDDER: Objection, Your Honor.

7 THE COURT: Sustained. I mean sustained.

8 BY MR. TROP:

9 Q. We mentioned -- Ms. Tedder mentioned a
10 couple of, I think very broadly, how much money
11 these tobacco companies paid you for, you said you
12 did another exam of another flight attendant,
13 correct?

14 A. Correct.

15 Q. And this one. So that's two exams,
16 correct?

17 A. Correct.

18 Q. They last about what, an hour
19 approximately?

20 A. I'm sorry.

21 Q. How long do the exams last?

22 A. Which exam?

23 Q. Of the two people?

24 A. They --

25 Q. Mrs. French?

1 Q. And then there seems to be some type of
2 conference for another, what is that, \$200?

3 A. Correct.

4 Q. So you charged \$800 for that, just that
5 exam, just with respect to that exam; is that
6 correct?

7 A. Correct.

8 Q. And the date of the bill up there at the
9 top I think says October 8th, but that occurred on
10 October 5th; is that correct?

11 A. Correct.

12 Q. I just have a calendar here, doctor, to
13 kind of, just a calendar of 2001.

14 THE COURT: It's upside down.

15 MR. TROP: It works better if you do it
16 this way.

17 Okay.

18 BY MR. TROP:

19 Q. So on October 8th, you charged them \$800.
20 I'll try to move this out so the jury can see.

21 We've got so many exhibits.

22 Okay, \$800. What's the next bill? Of
23 course you said you met with some people before you
24 actually examined her, right?

25 A. Right.

1 Q. So here's a bill from September 6th,
2 right? And I see you're charging them another 1050
3 for three hours of review of records, right?
4 A. Correct.
5 Q. It says Ms. O'Neil, is that someone from
6 Shook Hardy up on the top right-hand side?
7 A. Correct.
8 Q. So that is September 6th, 1050.
9 Sorry for my handwriting, some people
10 tell me I should have been a doctor. Bet you hear
11 that a lot.
12 Here's another conference with Ms. O'Neil
13 and that is on August 20 for \$400?
14 MS. TEDDER: Objection, Your Honor.
15 THE COURT: I'll sustain the objection.
16 I don't think you should put that on there.
17 MR. TROP: Judge, the Defendant is paying
18 this doctor.
19 THE COURT: Well, you'll have to clarify
20 if it's not this case.
21 MR. TROP: Right. Could you put that
22 back?
23 BY MR. TROP:
24 Q. And that one case Leon, that indicates
25 that it was paid on the other case, right?

1 A. Right.
2 Q. And that's August 20th, 400.
3 What's the next one?
4 There's \$600, that's again on Leon, 7-30,
5 July 30th, right?
6 Now, you haven't examined Ms. Leon yet,
7 either, just to keep it in perspective, right, you
8 haven't examined anybody yet?
9 THE COURT: When are you talking about?
10 MR. TROP: At the time of this bill; is
11 that correct?
12 THE WITNESS: Well, I had not examined
13 Ms. French.
14 MS. TEDDER: Objection, Your Honor. He
15 keeps referring to bills that have nothing to
16 do with this case. I don't see the relevance
17 of those for this particular examination.
18 It's beyond the scope, first of all, of
19 direct. I asked him what he was paid in this
20 case.
21 THE COURT: Overruled.
22 BY MR. TROP:
23 Q. There's one for 850. I don't know if the
24 jury probably can't see that. But \$850, again, it
25 says Leon, right, \$850 on July 16th. Is that

1 correct?
2 A. Correct.
3 Q. This is my favorite. This is, you billed
4 on --
5 MR. REILLY: Objection, Your Honor.
6 THE COURT: Sustained.
7 MR. TROP: I'm sorry.
8 BY MR. TROP:
9 Q. You billed on June 26th 23 hours of -- is
10 that reviewing documents from the tobacco company?
11 A. Correct.
12 Q. So that's 6-26. That's 8,050, right?
13 Now, these are the documents that they provided to
14 you, the tobacco companies?
15 A. Correct.
16 Q. So in June you're not going to examine
17 her until October, but in June you're billing 8,050
18 for examining their documents.
19 Here we have the same day. That's
20 another hour and a half for \$600, right? Certainly
21 you didn't do all this in one day, right?
22 A. Right.
23 Q. That's 25 and a half hours for June 26th.
24 But you billed it and of course you got paid for
25 all this?

1 A. Yes.
2 Q. Did the tobacco companies ever say, well,
3 that seems a little high, you know, I'm not going
4 to pay that bill?
5 A. Well, they, the checks usually come from
6 Shook Hardy and Bacon. I don't know about the
7 tobacco companies.
8 Q. But, doctor, you know, don't you, that --
9 you know who they represent?
10 A. Yes.
11 Q. You don't think that that money is coming
12 from Mr. Reilly or Ms. Tedder?
13 MR. REILLY: Objection, Your Honor.
14 THE COURT: Can't we have Ms. Tedder?
15 MR. REILLY: But he's referring to me
16 personally.
17 THE COURT: Still. Overruled.
18 You may answer.
19 Do you remember the question? Who do you
20 think is paying the bill; who do you think is
21 paying your bills.
22 THE WITNESS: Well, the checks come from
23 Shook Hardy and they represent the tobacco
24 companies. I guess they're funding their
25 payments.

1 BY MR. TROP:
 2 Q. The tobacco companies, there isn't just a
 3 Marlboro Man or something, they have their lawyers
 4 and they meet with you and that's how they do their
 5 business, right?
 6 A. Right.
 7 Q. It's going to take me a while to go
 8 through all of this.
 9 There's another bill for \$400. It
 10 doesn't say what it's for, but it's a conference,
 11 see, you met with someone for an hour on November
 12 12th of 2001, correct?
 13 A. Correct.
 14 Q. Here's another \$800 for meeting with
 15 someone from Shook Hardy, say for another two
 16 hours; that's November of 2001, correct?
 17 A. Correct.
 18 Q. Here we go with, this is a short one, 20
 19 minute phone conference, I guess that's on January
 20 30th of 2001. Sorry, November 30th.
 21 Here's another two hour conference on
 22 December 7th of 2001. That has Leon up there.
 23 Is that correct?
 24 Tell me if you see any bills that you
 25 don't think are yours. You recognize this form,

1 A. Correct.
 2 Q. And now we're in January, again, I guess
 3 two days later, you're charging \$700 for what's
 4 that, we've got, I guess we've got an hour and then
 5 two hours; is that more research, review of
 6 information?
 7 A. Correct.
 8 Q. Review of literature. Okay. Can you go
 9 on to the next one, please? Another \$600 for four
 10 hours of -- that's another conference, another four
 11 hour conference with another Shook Hardy lawyer; is
 12 that what it is?
 13 A. Correct.
 14 Q. You've got office hours during all this
 15 time, right, patients? Are you meeting at night or
 16 during the day or when?
 17 A. Usually at the end of the day.
 18 Q. We're still in January, we've got another
 19 four hours, \$1,600; is that correct?
 20 A. Correct.
 21 Q. Now we get to February. And we've got
 22 two hours of looks like more literature review,
 23 right, another 700 bucks?
 24 MR. ENGRAM: Objection, Your Honor.
 25 Deposition on that date.

1 right?
 2 A. I do.
 3 Q. That's your form?
 4 There's another hour and a half
 5 conference again. It says Leon up there. Another
 6 \$600 in December. Correct?
 7 A. Correct.
 8 Q. There's another hour and a half December
 9 18th for another \$600. Correct?
 10 A. Correct.
 11 Q. Here we're getting into January, here's
 12 \$1,050 for more medical research, right, looks like
 13 a conference and some research, right?
 14 A. Right.
 15 Q. And here we're still in January of 2002,
 16 another \$1,400, that's French and Leon up there.
 17 That's for more of review of documents, correct?
 18 A. Correct.
 19 Q. And yeah, we're still in January of 2002,
 20 we've got now \$1,600 for, that's for a conference.
 21 Who were you meeting with when you had all these
 22 conferences; was it different lawyers or --
 23 A. They were different lawyers.
 24 Q. Different lawyers from the Shook Hardy
 25 law firm?

1 BY MR. TROP:
 2 Q. Okay, so you attended a deposition. But
 3 that's your billing Shook Hardy still?
 4 MR. REILLY: Should have been billing
 5 you.
 6 MR. TROP: It's for the pre-depo
 7 conference, is it not before the deposition?
 8 THE COURT: It says depo prep.
 9 THE WITNESS: That's a different one.
 10 BY MR. TROP:
 11 Q. Is that April 4th? It's another \$1,600,
 12 that's another four hour meeting, right?
 13 A. Right.
 14 Q. Now, just so it's clear, you're not ever
 15 meeting except for the deposition you gave in each
 16 case, you're not meeting with myself or
 17 Mr. Weinstein or Ms. Weinstein, all these meetings
 18 are with the Shook Hardy lawyers, right?
 19 A. Right.
 20 Q. Here we've got something at -- oh, we
 21 have six hours here on April 6th for review of
 22 literature again. And the French depo I guess
 23 that's for \$2,400; is that correct?
 24 A. Correct.
 25 Q. And here was another four hours for

1 review of I guess the French depo again. It says
2 4-7 another four hours for \$1,600. Now, there were
3 quite a lot of depositions in the French case, right? So
4 you had to read them?

5 A. Yes.

6 Q. Of Mrs. French.

7 And you read Mrs. French's depositions, didn't
8 you?

9 A. I did.

10 Q. And they were over three different days,
11 weren't they?

12 A. Yes.

13 Q. About 12 hours of questioning; did you
14 read all that?

15 A. Yes.

16 Q. They questioned her for 12 hours.

17 Now, April 10th, let's see what we got
18 there. Deposition of Lynn French, again it says
19 another four hours, looks like deposition, but, oh,
20 that was a deposition. Must have gone somewhere.
21 Parking. \$2,065, right?

22 A. Right.

23 Q. Next one. And there's May 3rd, here's
24 another \$1,600. That's for four hours of
25 conference again, right, with these Shook Hardy

1 four hours

2 Shook Hardy

3 \$1,600, right?

4 A. Right.

5 Q. And

6 French it

7 Is that what

8 the trial is

9 So

10 four hours

11 24th --

12 M

13 BY MR. TROP:

14 Q. I'm sorry, May. That's May you're
15 preparing for the trial?

16 A. Right.

17 Q. What are they doing all this time when
18 they're meeting with you in preparation for the
19 trial?

20 A. Well, we -- not only do I talk to them,
21 but I also review the records, we discuss CAT
22 scans, we discuss the literature and it's a back
23 and forth conversation about the overall case.

24 Q. And they're telling you the questions
25 that are going to be asked of you, right? When it

1 lawyers?

2 A. Right.

3 Q. Now we're in May 4th, I've got two hours
4 here of -- what do we have here, looks like record
5 review, right, another two hours, correct?

6 A. Correct.

7 Q. And the reason I have to have you say
8 correct is so the Court reporter can take it down.

9 Now, the next day we've got May 5th,
10 2002, 2100, looks like six hours of more record
11 review, right?

12 A. Right.

13 Q. Now, Dr. Persky's records you went
14 through, they were about this thick, right?

15 A. Just about.

16 Q. Ninety pages I think Ms. Tedder said.

17 Here we're on May 6th, we've got two
18 hours of record review again, although that says
19 Leon, that's \$700, correct?

20 A. Correct.

21 Q. Okay. Now we're on May 8th. 2500 for
22 five hours, that appears to be the deposition,
23 that's the one you gave in the other case, right?

24 Now we're up to May the 20th or 28th, one
25 of those two dates. What do we have here, this is

1 says trial prep, right?

2 A. We go back and forth about what happens
3 in courtroom, because remember, I'm just a simple
4 doctor, I'm not a lawyer.

5 Q. ~~I know that.~~ But you're becoming a
6 pretty well paid doctor from the tobacco companies,
7 aren't you?

8 MR. REILLY: Objection.

9 THE COURT: Overruled.

10 THE WITNESS: That's the American way,
11 you get paid for services just like you do. I
12 didn't invent that. That is the capitalistic
13 way.

14 BY MR. TROP:

15 Q. Let's go on a little bit. Here is May
16 31st, and we've got another four hours. Let's see,
17 it says, French trial, Lynn French trial, another
18 four hours. Same kind of thing, you're rehearsing
19 what testimony you're going to give and they're
20 telling you how to respond in front of the jury,
21 that kind of thing?

22 MS. TEDDER: Objection, Your Honor.

23 THE COURT: Overruled.

24 You may answer.

25 THE WITNESS: Like I answered before, you

1 know, it's a back and forth conversation of
2 everything, all the intricacies, the
3 legalities and medical aspect of the case.

4 BY MR. TROP:

5 Q. That's all the documents we have. But
6 that was May 31st, the last one; you've submitted
7 more since then I'm sure, right?

8 A. Well, I don't recall right now. I
9 haven't reviewed that recently.

10 Q. But I'm sure you did a lot more work
11 since May 31st. You were going at a pretty good
12 clip there, weren't you, meeting with the Shook
13 Hardy lawyers and practicing?

14 A. Yes.

15 Q. You think you probably billed a
16 significant amount more than that?

17 A. Well, I don't know. I would have to sit
18 down and review the things. I don't have that
19 available with me now.

20 Q. Of course you charged them, what is it,
21 about \$5,000 a day to be in trial here?

22 A. Yes.

23 Q. And you've been here a long time. Well,
24 you've been up here all day today.

25 Would it surprise you if you get paid,

1 BY MR. TROP:

2 Q. Sorry.

3 Aside from examining Ms. French here and
4 the other woman that's not at issue here and
5 meeting with the Shook Hardy lawyers and reading
6 things about things that they gave you and some
7 things you picked up yourself, have you done
8 anything else for the almost \$50,000?

9 A. Well, like I said, I have reviewed
10 X-rays. I have done independent research. I have
11 reviewed some of my own literature. And I had the
12 different meetings plus review of the voluminous
13 records available.

14 Q. We've already gone over it, I'm not going
15 to go over it again. It was after they supplied
16 you with the research and you perhaps did some of
17 your own that you arrived at the opinion that
18 Ms. French -- well, that secondhand smoke does not
19 cause chronic sinusitis, right?

20 A. It's my expert medical opinion that
21 chronic sinusitis is not caused by ETS.

22 Q. Let me ask you something, doctor, when do
23 you research -- you're a scientist, right?

24 A. Right.

25 Q. When a scientist does research, they

1 even if you get paid just \$5,000 today and without
2 all the other things that the other bills that you
3 haven't submitted, would it surprise you to know
4 that they paid you over \$50,000 already in relation
5 to these two --

6 MS. TEDDER: Objection, Your Honor. He's
7 mischaracterizing.

8 MR. TROP: We can add it.

9 MS. TEDDER: The bills.

10 THE COURT: Well, I don't know what -- I
11 can't rule on whether it's the correct amount
12 or not because I haven't added them up. I
13 don't know if anyone has added them up.

14 BY MR. TROP:

15 Q. May I restate the question?

16 Would it surprise you that before today
17 and without including any of those other bills,
18 just the ones we added up, there's \$45,365 that
19 you've billed in relationship to examining these
20 two women for an hour a piece?

21 A. I thought it was --

22 MS. TEDDER: Objection, Your Honor, the
23 question mischaracterizes.

24 THE COURT: I think it's a little unfair
25 when you say examined.

1 often times use other existing research to build up
2 to support what they're researching; is that
3 correct?

4 A. Correct.

5 Q. Is it important to know the source of the
6 previous research?

7 A. What do you mean by source?

8 Q. Well, somebody like you could get
9 something from the Mayo Clinic or Johns Hopkins
10 University on one hand and something from say
11 Carl's Auto Repair something in the other. You
12 want to know what the source of your information
13 is, don't you, when you're researching?

14 A. Yes, I like to see the author and the
15 institution where it comes from.

16 Q. It's important to consider that when
17 relying upon whatever research you rely upon, isn't
18 it?

19 A. Yes.

20 Q. Didn't any light go off in your head,
21 doctor, when --

22 MS. TEDDER: Your Honor, I object to this
23 line of questioning. I think this is
24 something that needs to be taken up before the
25 Court.

1 THE COURT: Let me hear your question.
 2 BY MR. TROP:
 3 Q. My question is: Doctor, when you're
 4 getting all this research and all this money from
 5 the tobacco companies, didn't you for a second
 6 maybe question whether the research they were
 7 giving you was a little skewed to one side?
 8 MS. TEDDER: Objection, Your Honor.
 9 THE COURT: Overruled.
 10 You may answer.
 11 THE WITNESS: I formed my own opinions
 12 based on the author and institution where that
 13 research is coming from.
 14 BY MR. TROP:
 15 Q. But the research I'm talking about
 16 specifically, I know you said you did some of your
 17 own research, but I'm talking about the research
 18 that these lawyers gave you. All right. You knew
 19 they were lawyers for the tobacco company, right?
 20 A. Right.
 21 Q. When they gave you all this research that
 22 you spent, I don't know how many hours reviewing,
 23 did you say to yourself, you know, I wonder if
 24 maybe the tobacco company is giving me all the
 25 research or maybe they're kind of giving me

1 research to push my opinion one way or the other.
 2 Did that thought occur to you?
 3 A. I don't think so, because it was
 4 compatible with my experience of 19 years treating
 5 patients with sinusitis.
 6 Q. So you trusted the tobacco company to
 7 give you the fair and honest and open, impartial
 8 research, right?
 9 A. Well, all the data that I received came
 10 from institutions, so I had no reason to doubt,
 11 like I said it was compatible with my own research
 12 and also my experience in treating patients with
 13 chronic sinusitis for 19 years.
 14 Q. They didn't give you any research, I
 15 guess, that said that there was anything wrong with
 16 secondhand smoke, that it was harmful to people,
 17 did they?
 18 A. They provided me with all sort of papers
 19 and research talking about both sides of the coin.
 20 Q. Did they tell you how many other doctors
 21 they talked to before they hired you to examine
 22 Ms. French?
 23 MR. REILLY: Objection, Your Honor.
 24 THE COURT: Sustained.
 25 MR. TROP: I have a basis, judge.

1 THE COURT: Approach the bench.
 2 (A bench conference occurred as follows:)
 3 THE COURT: Let me see if I understood
 4 what your basis is. What is your basis for
 5 that objection?
 6 MR. REILLY: My basis, Your Honor, is
 7 that it's completely impermissible to ask how
 8 many doctors have you inquired, how many
 9 doctors have you gone through before you got
 10 to me?
 11 THE COURT: That is a little different
 12 from the question. The question is: Did they
 13 tell you how many doctors?
 14 MR. REILLY: Same difference. There's no
 15 difference between saying how many doctors did
 16 they go to before they got you versus did they
 17 tell you how many they went to.
 18 THE COURT: Why is it impermissible?
 19 MS. TEDDER: Where's the good faith
 20 basis?
 21 MR. REILLY: It has nothing to do with
 22 good faith basis. It has everything to do
 23 with it's highly argumentative statement and
 24 case law. And I'll provide you with the case
 25 law.

1 THE COURT: I don't think it's
 2 argumentative.
 3 MR. REILLY: It is not permitted to ask
 4 someone how many doctors did you go to before
 5 you got to this one, how many -- just like --
 6 THE COURT: Tell me why.
 7 MR. REILLY: Because it is an
 8 argumentative question, there's no probative
 9 value to it. That's it. There is no
 10 probative value to it. It's not permitted.
 11 But I'm happy to give you the case that's
 12 right on. I'll ask for a mistrial, they
 13 should never have asked this question.
 14 THE COURT: Do you have the case handy?
 15 MR. REILLY: No, because I wouldn't dream
 16 you would ask that, it's the same basis on
 17 which the question was asked and you said no,
 18 you can't ask that about the 7 to 10,000
 19 doctors in the United States who are ENTs. I
 20 mean, this is black letter law in the state of
 21 Florida. I'm astounded he asked this
 22 question.
 23 THE COURT: Did you ask this question in
 24 deposition?
 25 MR. REILLY: No, of course not.

1 THE COURT: I mean, do you have any idea
2 what he's going to say?

3 MR. TROP: No. But I have in my
4 possession in his file an e-mail from Shook
5 Hardy to him about an airline cabin some kind
6 of article where it's copied to a number of
7 different doctors.

8 THE COURT: But, I think it might have to
9 do with a good faith basis to ask a question.
10 Because, see, the question implies something
11 in itself. If you just throw out the question
12 without a basis to ask it, you know, I mean, I
13 think that's a problem, actually. Maybe more
14 than these other ones.

15 MR. ENGRAM: He doesn't know how many
16 doctors I talked to.

17 THE COURT: He's asking did they tell
18 you? Now, if you don't have any basis to
19 think that they did discuss this with him, I
20 think it's an improper question because it
21 implies something. Even if he says no, it
22 implies that they did search around for a
23 whole lot of doctors. So I think that you
24 need a good faith basis to ask the question.

25 MR. TROP: That's what I was trying to

1 Q. Doctor, as I understand your testimony,
2 I'm going to ask you specific questions, but I want
3 to get really to the gist of your opinions.

4 Your opinion is that Ms. French, who has
5 chronic sinusitis, developed that chronic sinusitis
6 because of either the concha bullosa, bacteria,
7 allergies, barrow trauma scarring from the surgery,
8 or a combination of many of those things; is that
9 correct?

10 A. Correct.

11 Q. It absolutely had nothing to do with the
12 thousands and thousands of hours she spent in a
13 small pressurized cabin with poisonous noxious
14 fumes going up her nose, that had nothing to do
15 with it, right?

16 A. Which poisonous fumes are you talking
17 about?

18 Q. Tobacco smoke.

19 A. Had nothing to do with tobacco smoke.

20 Q. Let's go down, if we could -- you've
21 spent so much time going over this, you probably
22 have done an awful lot of reading obviously about
23 secondhand smoke, haven't you?

24 A. Yes.

25 Q. And in rendering an opinion, coming into

1 tell the Court about the e-mail.

2 THE COURT: But what did the e-mail say?

3 MR. TROP: It was an article about
4 bacteria in flight cabins.

5 THE COURT: How does that affect this
6 issue?

7 MR. TROP: They sent it to him and a
8 bunch of other doctors. I think these are
9 other consulting doctors.

10 THE COURT: I don't think that's a good
11 enough basis.

12 MR. REILLY: Maybe they're doctors we've
13 employed in other cases.

14 THE COURT: It implies that they went
15 through 20 doctors before they found him that
16 would say that there's no connection between
17 this. And unless you have some basis to ask
18 the question, I'm not going to let you ask it.
19 And the basis you've asserted I don't think
20 it's good enough. The fact that an e-mail was
21 sent to a bunch of doctors, I don't think that
22 supports this. On that basis I'll sustain the
23 objection.

24 (The bench conference ended.)

25 BY MR. TROP:

1 court and being under oath in an important case
2 like this, I'm sure you wanted to do everything you
3 could to make sure that your opinions were as
4 accurate as possible, right?

5 A. Right.

6 Q. And that's why you spent so much time
7 meeting with lawyers and reviewing, right?

8 A. Right.

9 Q. You, of course, have seen the list of
10 chemicals that are contained in both firsthand
11 smoke and in secondhand smoke, haven't you?

12 A. Somewhere along the line, I came across
13 this.

14 Q. Of course that's what we're talking
15 about. I'm talking about the smoke that Ms. French
16 says caused her problem, secondhand smoke, right?

17 A. Right.

18 Q. You with agree with me, doctor, that
19 there really isn't much of a difference between
20 direct cigarette smoke and what they call
21 sidestream secondhand smoke? In other words, the
22 smoke that comes off the end of a cigarette. You'd
23 agree with me, wouldn't you? Correct? As far as
24 the actual composition of the smoke, what's in it,
25 right?

1 A. Right.
 2 Q. Pretty much the same thing, although I
 3 understand it's your opinion that there's a lesser
 4 concentration of secondhand smoke, usually, than
 5 just puffing it, right?
 6 A. Less concentration?
 7 Q. Secondhand smoke, it's the same basic
 8 substances in the two things, but less
 9 concentration in secondhand smoke in general,
 10 right?
 11 A. In general, yes.
 12 Q. You know, of course, that there -- I'm
 13 sure you've seen the list, there are or 4,000
 14 different substances in secondhand smoke, right?
 15 A. Well, I don't know if there are 4,000.
 16 MS. TEDDER: Objection, Your Honor.
 17 THE COURT: I think part of the objection
 18 is what is included in secondhand smoke. So
 19 maybe you, you know, I don't know if it
 20 matters to you if it's 4,000.
 21 BY MR. TROP:
 22 Q. You know that ammonia, for example, is in
 23 secondhand smoke?
 24 MR. REILLY: I'd object, Your Honor.
 25 THE COURT: Wait a minute. Ms. Tedder.

1 smoker breathes in and then exhales, right? Or
 2 maybe you don't know. I don't want to put words in
 3 your mouth.
 4 A. I don't know.
 5 Q. But whatever the case is, you've just
 6 said that the sidestream smoke that comes off the
 7 end of the cigarette is basically the same
 8 composition as direct smoking that a cigarette
 9 smoker takes?
 10 A. Correct.
 11 Q. And you know that there are a number of
 12 irritants and things that cause problems in the
 13 respiratory system in secondhand smoke, right?
 14 A. Right.
 15 Q. For example, you know that ammonia is in
 16 secondhand smoke, is it not?
 17 MS. TEDDER: Objection, Your Honor.
 18 THE COURT: What's your objection?
 19 MS. TEDDER: Relevance.
 20 THE COURT: Overruled. I mean, I don't
 21 know if you're going to connect it up somehow.
 22 You may answer.
 23 THE WITNESS: Yes, I'm familiar with
 24 ammonia.
 25 BY MR. TROP:

1 Ammonia is in -- what are you saying?
 2 MR. TROP: Secondhand smoke.
 3 THE COURT: Okay, is there an agreement
 4 about what we're talking about when we say
 5 secondhand smoke in terms of this?
 6 MR. TROP: Maybe I'll back up. I'm
 7 sorry, Your Honor, you're correct.
 8 BY MR. TROP:
 9 Q. There's really two kinds of secondhand
 10 smoke, aren't there?
 11 A. Yes.
 12 Q. The two kinds being the smoke that comes
 13 off on the end of the cigarette, which sometimes
 14 they call sidestream smoke and then the smoke that
 15 someone breathes in and then exhales, right; those
 16 are really the two kinds of secondhand smoke,
 17 right?
 18 A. That what we call ETS or environment
 19 tobacco smoke.
 20 Q. But those are the two kinds, right?
 21 A. Yes.
 22 Q. And you know and the science knows and
 23 has known for some time that the kind, the
 24 sidestream smoke that comes off the end of the
 25 cigarette is more dangerous than the kind that the

1 Q. And you know it's in secondhand smoke,
 2 too?
 3 A. Yes.
 4 Q. And you know it's an irritant to the
 5 nasal passages, don't you?
 6 A. Yes.
 7 Q. And you know that formaldehyde is in both
 8 secondhand smoke -- well, it's in secondhand smoke,
 9 isn't it?
 10 A. It depends, it may or may not.
 11 Formaldehyde belongs to a different kind of family,
 12 which they tend to evaporate fairly quickly when in
 13 contact with heat.
 14 Q. Do you believe that formaldehyde is in
 15 secondhand smoke, yes or no?
 16 A. I said it may or may not. I don't know.
 17 Q. You don't know if it is or not?
 18 A. Right.
 19 Q. You certainly know that nicotine is in
 20 secondhand smoke, don't you?
 21 A. Yes.
 22 MS. TEDDER: Same objection.
 23 THE COURT: You'll have to relate it to
 24 some issue in the case.
 25 BY MR. TROP:

1 Q. Nicotine is an irritant, is it not?
 2 MS. TEDDER: Same objection, Your Honor.
 3 THE COURT: Sustained. It will have to
 4 be related to chronic sinusitis.
 5 BY MR. TROP:
 6 Q. Nicotine irritates the mucus membranes,
 7 does it not?
 8 MS. TEDDER: Same objection, Your Honor.
 9 THE COURT: Overruled.
 10 You may answer this.
 11 THE WITNESS: It would depend on the
 12 concentration, if you're a high concentration,
 13 maybe you will get irritation. If you have a
 14 small concentration you will not.
 15 BY MR. TROP:
 16 Q. Of course I know we're not allowed to
 17 smoke in this room, but if someone lit up a
 18 cigarette at the end of the room, most likely not
 19 going to cause irritation in your nose or my nose
 20 or sinuses?
 21 A. Slightly.
 22 Q. But if we were in a -- let's say the
 23 ceiling were about this high and there were from
 24 maybe there to there 100 or 200 people lit up in a
 25 pressurized cabin, that's an awful lot of

1 secondhand smoke, much more likely to cause
 2 irritation, isn't it?
 3 MS. TEDDER: Objection, Your Honor.
 4 THE COURT: Irritation where?
 5 BY MR. TROP:
 6 Q. I'm sorry, in the mucus membranes in the
 7 sinuses?
 8 A. Well, you have to look at all the
 9 variables, because if the windows are open and
 10 there's air going in and out, your exposure goes
 11 down, it would depend on the particular situation.
 12 Q. Let's say no windows.
 13 A. What about it?
 14 Q. Let's say the same situation, but no
 15 windows.
 16 MS. TEDDER: Your Honor, I still object
 17 to the hypothetical.
 18 THE COURT: Overruled.
 19 You may answer.
 20 THE WITNESS: Yes, there's no ventilation
 21 and no air going in and out you will get high
 22 concentration.
 23 BY MR. TROP:
 24 Q. Acetone is an irritant to the mucus
 25 membranes that is in secondhand smoke, is it not?

1 MS. TEDDER: Objection, Your Honor, based
 2 on relevance.
 3 THE COURT: Overruled.
 4 THE WITNESS: Yes.
 5 BY MR. TROP:
 6 Q. Carbon monoxide is an irritant, dangerous
 7 irritant that effects the mucus membranes in the
 8 sinuses; it's in secondhand smoke, is it not?
 9 A. When you say it effects the mucus
 10 membrane in the sinuses, what do you mean?
 11 Q. Well, does it have an effect, does it
 12 irritate the mucus membranes?
 13 A. It can irritate the mucus membranes, yes.
 14 Q. And it in particular is colorless and
 15 odorless, isn't it?
 16 A. Correct.
 17 Q. The source of a lot of serious problems
 18 for people, is it not, carbon monoxide?
 19 A. It's usually associated with the exhaust
 20 of the cars, so we're all familiar with that.
 21 Q. With the?
 22 A. Exhausts of the cars.
 23 Q. Of course, but this would be exhaust that
 24 is going into your nose and mouth, right?
 25 A. Yes.

1 Q. Secondhand smoke in general, doctor, is
 2 an irritant to the respiratory system, is it not?
 3 A. It can be an irritant, it would depend,
 4 again, in the manufacture, such as concentration,
 5 exposure, ventilation, so you have to be careful
 6 when you make such a generalization.
 7 Q. Well, you're absolutely correct. I'm
 8 glad you said that. But depending upon -- there
 9 are some circumstances certainly where secondhand
 10 smoke is an irritant to the respiratory tract,
 11 right?
 12 MS. TEDDER: Objection, Your Honor.
 13 THE COURT: Overruled.
 14 You may answer.
 15 THE WITNESS: Yes.
 16 BY MR. TROP:
 17 Q. And also there are circumstances where
 18 it's an irritant to the mucosa, secondhand smoke,
 19 right?
 20 A. It can be.
 21 Q. And to the nasal passages it's an
 22 irritant under certain circumstances to the nasal
 23 passages?
 24 A. Correct.
 25 Q. And secondhand smoke depending on the

1 amount of exposure to it can affect the cilia, this
 2 jury knows a lot about cilia now, in the nose, in
 3 the sinuses in different ways, right?
 4 A. Yes.
 5 Q. With some people, for some reason
 6 secondhand smoke will actually cause the cilia to
 7 move faster, right, to speed up?
 8 A. Correct.
 9 Q. But to some people, perhaps about 25
 10 percent of people, it causes the cilia to slow down
 11 substantially, right?
 12 A. Yes.
 13 Q. And this cilia is what is pushing these
 14 little, like the wave, you said before, pushing the
 15 mucus through the sinuses, also helping to get rid
 16 of anything that might not -- that maybe shouldn't
 17 be there, right?
 18 A. Right.
 19 Q. But secondhand smoke at least in 25
 20 percent of people causes these cilia to slow down,
 21 right?
 22 A. Well, the paper that I'm familiar, I
 23 don't know if it was exactly 25 percent. It was an
 24 incident that indicated that that was not
 25 significantly, statistically significant. And the

1 conclusion was that secondary smoke did not cause
 2 chronic sinusitis or enough immobility of the cilia
 3 for it to explain for infections.
 4 Q. That's the one I was getting at. This is
 5 one of the things that they actually supplied you
 6 with, that study, right?
 7 A. Which one?
 8 Q. That you just referred to?
 9 A. Yes.
 10 Q. That's the one that says in 25 percent of
 11 people secondhand smoke causes the cilia to slow
 12 down substantially, right?
 13 A. Not substantially, just slow down.
 14 Q. And, doctor, I know you -- we saw how
 15 many hours you spent going over the research. How
 16 much exposure -- in that limited study, how much
 17 exposure did they give the people to get the cilia
 18 to slow down, how much exposure to secondhand
 19 smoke?
 20 A. I would like to review the paper because
 21 I don't have all that information. I don't recall
 22 the information.
 23 Q. It was an hour, wasn't it? They gave 12
 24 people -- let me see if this refreshes your
 25 recollection -- they gave 12 people --

1 MS. TEDDER: Objection, Your Honor.
 2 THE COURT: What is your objection?
 3 MS. TEDDER: He's asked to see the study.
 4 THE COURT: Yes, show him the study, if
 5 you would.
 6 MR. TROP: May I approach the witness,
 7 Your Honor?
 8 THE COURT: Yes.
 9 MR. TROP: This is my only copy, doctor.
 10 Can I stand here with you for a moment?
 11 THE WITNESS: Okay.
 12 BY MR. TROP:
 13 Q. Could I see it now? I'll hand it back to
 14 you if you need it.
 15 That study where they got 12 people,
 16 which isn't a huge study, right?
 17 A. Right.
 18 Q. And they exposed them to -- each of them
 19 to an hour of secondhand smoke, right?
 20 A. Right.
 21 Q. And three of them, that's where I got the
 22 25 percent, their cilia decreased substantially,
 23 did it not?
 24 A. That's what it says.
 25 Q. So you don't have any reason to doubt --

1 this came from tobacco lawyers, right?
 2 A. Well, it came from the tobascom
 3 (phonetics).
 4 Q. But the tobacco lawyers gave it to you?
 5 A. Yes, they did.
 6 Q. So you have no reason to dispute that,
 7 right?
 8 A. No.
 9 Q. I want to go over some of the causes that
 10 you've listed to Ms. French's -- of Ms. French's
 11 sinusitis, at least according to your opinion.
 12 Let's talk about this. Is it concha
 13 bullosa or concha bullosa?
 14 A. You can say either.
 15 Q. Let's go with concha bullosa.
 16 You really think that had something to do
 17 with her problems?
 18 A. Yes, I do.
 19 Q. I think you said earlier and I could be
 20 wrong, please correct me if I am, that that's
 21 something you're born with?
 22 A. Well, it's what we call a developmental
 23 finding. In other words, when we are born, not all
 24 the sinuses are developed. As we grow older the
 25 sinuses start growing, the inside of the nose, the

1 outside of the nose, the turbinates start growing.
 2 At that point that's when some people will develop
 3 the concha bullosa.
 4 Q. But certainly when she was a young woman
 5 she would have had this concha bullosa, right?
 6 I said it a different way this time.
 7 A. Yes.
 8 Q. Like she said, we know that she had that
 9 surgery in 1989, she would have, if she has this
 10 significant concha bullosa now, she would have had
 11 it then, too, right?
 12 A. Right.
 13 Q. It's not something -- in other words,
 14 that just, you know, someone in their 50s is going
 15 to start growing one in a couple of years, right?
 16 A. Right.
 17 Q. It's there basically since you're young.
 18 Doctor, let me show you, these are
 19 already in evidence. I'm going to show you a copy
 20 of the CT scan that was taken in 1989, okay?
 21 THE COURT: The report.
 22 MR. TROP: The report, I'm sorry, yes.
 23 BY MR. TROP:
 24 Q. Now, you didn't actually see this film;
 25 is that correct?

1 A. Correct.
 2 Q. Because it doesn't exist anymore, right?
 3 A. Correct.
 4 Q. And you realize, I'm sure you agree that
 5 medical records, they get destroyed after a while,
 6 they're not held indefinitely?
 7 A. Right.
 8 Q. For instance, when you stop seeing a
 9 patient, how long do you keep medical records of
 10 that patient?
 11 A. I think we keep them for like seven
 12 years.
 13 Q. If you have a patient and they move or
 14 something like that, after seven years you'll
 15 destroy the records?
 16 A. Yes.
 17 Q. And you know that a lot of the medical
 18 records from Ms. French's physicians that she saw
 19 12 or 15 years ago have been destroyed, right?
 20 A. Right.
 21 Q. That CT scan from 1989 apparently was one
 22 of them, right?
 23 A. Apparently.
 24 Q. But we have the report because it was in
 25 Dr. Persky's reports, right?

1 A. Right.
 2 Q. Do you see anything about the concha
 3 bullosa in that report?
 4 A. No.
 5 Q. Do you have any doubt that if she has one
 6 now, there was one there?
 7 A. Well, you see the date, 1989, you have to
 8 understand the chronology of what we call
 9 endoscopic sinus surgery. During the 1986, '87,
 10 that's when the concept, 1988, of endoscopic sinus
 11 surgery really gets imported here into the United
 12 States. At that point we were educated to the fact
 13 that we, the otolaryngologists, had to sit down
 14 with the radiologist and explain to them what the
 15 new information that we needed to have available
 16 from the CAT scans, which we were now ordering.
 17 In the past we were ordering axial CAT
 18 scans in. In other words, we used to do this
 19 cutting. Now endoscopic sinus surgery, the
 20 professors, we start telling the radiologists you
 21 have to start doing this way. You have to tell the
 22 radiologists that they have to tell the patient has
 23 the concha bullosa or if they have blockage of
 24 immuno complex.
 25 When I went and took my courses and I

1 started doing surgery, I had to sit down more or
 2 less during that period of time, 1989, 1990, with
 3 the radiologist and I had to instruct them what a
 4 concha bullosa was and what are the new anatomical
 5 findings and information that we need from the CAT
 6 scan.
 7 So when I read this report it's not only
 8 missing the fact that the patient had concha
 9 bullosa, but there's no reference either to the
 10 ostium complex, to the sinuses or ostium complexes.
 11 So obviously that radiologist was not
 12 familiar with the newer technique of endoscopic
 13 sinus surgery, nor was he familiar with the new
 14 information that the surgeon requires in order to
 15 make the appropriate assessment and diagnosis and
 16 prescribe the appropriate therapy based on the CAT
 17 scan.
 18 Q. In summary, you think that concha bullosa
 19 was there, but the radiologist didn't -- he just
 20 didn't put it on the report?
 21 A. The same way he didn't mention anything
 22 about the ostium. He didn't mention anything about
 23 the concha bullosa.
 24 Q. And of course Dr. Persky -- did you read
 25 his deposition?

1 A. Yes, I did.
 2 Q. I want you -- do you know if he actually
 3 looked at the film back then?
 4 A. Well, I can't speak for myself. I always
 5 look at films before I do the surgery. But that
 6 question you have to ask him.
 7 Q. So Dr. Persky didn't put down concha
 8 bullosa in his chart anywhere, did he?
 9 MR. REILLY: I'd object, Your Honor, he
 10 didn't look at it. He's testified here he
 11 didn't look at it.
 12 THE COURT: I don't remember what his
 13 testimony was about that. But unless you have
 14 some reason to say something else, I'll
 15 sustain the objection.
 16 MR. TROP: I just asked if he put it in
 17 his chart, concha bullosa.
 18 THE COURT: No, but you implied that
 19 Dr. Persky looked at the actual film. But I
 20 think that Mr. Reilly is correct, that he said
 21 he didn't look at it.
 22 MR. REILLY: That's correct, Your Honor,
 23 he didn't look at it.
 24 MR. TROP: I don't agree, but I'm not as
 25 certain as Mr. Reilly appears to be.

1 THE COURT: I'm not certain either, but
 2 of course we have a record.
 3 MR. TROP: We'll look at the transcript
 4 later.
 5 BY MR. TROP:
 6 Q. Now, there of course was a second CAT
 7 scan in 1995, right?
 8 A. Right.
 9 Q. Does that look familiar to you?
 10 A. Yes.
 11 Q. And as an otolaryngologist, you are used
 12 to, you rely upon radiologists to assist you in
 13 interpretation of diagnostic films, right?
 14 A. I read their reports, but I review my own
 15 films.
 16 Q. But they certainly help you, right?
 17 A. Yes.
 18 Q. And you're used to seeing, maybe not from
 19 this particular radiological group, but you're used
 20 to seeing reports like this?
 21 A. Yes.
 22 Q. You know how they put the important parts
 23 in the impression section, right, their findings?
 24 A. Sometimes they do. Sometimes they miss
 25 them. Sometimes they -- it depends on the time of

1 the day and how thorough the radiologist is.
 2 Q. Well, that's interesting, because you see
 3 where it says impression, it does say concha
 4 bullosa up here, but in the impression part it
 5 doesn't say anything about that, right?
 6 A. But it's -- I mean, that sentence too is
 7 part of the report. The fact that it wasn't an
 8 impression, doesn't mean anything but they looked
 9 at it and they recorded that.
 10 Q. But the part where the impression, the
 11 impression part is the significant part that
 12 they're telling the treater, right?
 13 A. For me the whole report is important.
 14 Especially I'm an ENT surgeon and I know what
 15 concha bullosa is better than anybody else.
 16 Q. So we have one report where concha
 17 bullosa is not even mentioned whatsoever, although
 18 you're certain it was there, that being the '89
 19 report, correct?
 20 A. The concha bullosa they don't grow from
 21 '89 to '95.
 22 Q. So it was definitely there, but the
 23 radiologist doesn't mention it at all?
 24 A. Correct.
 25 Q. In this report the radiologist mentions

1 it, but he doesn't put it in the impression
 2 section, correct?
 3 A. Yeah, but he did mention it.
 4 Q. He did. Is it possible, doctor, that the
 5 reason no one paid any attention to the concha
 6 bullosa is because it's an insignificant finding
 7 and it doesn't mean anything?
 8 A. Absolutely not. That's one of the most
 9 common reasons for chronic sinusitis. It's known
 10 by any otolaryngologist that it's a factor in
 11 producing chronic sinusitis. And I should say it's
 12 a very simple part of the function of endoscopic
 13 surgery to correct that.
 14 Q. Let me just show this number 32 of the
 15 chart. And you of course have your chart there.
 16 You can look at it if you prefer to see that.
 17 Would this be the preliminary report from the
 18 radiologist, if you can tell?
 19 This is on page 32.
 20 Does it look like a preliminary report?
 21 MR. REILLY: I'm going to object, Your
 22 Honor.
 23 THE COURT: Could we have Ms. Tedder?
 24 MS. TEDDER: Well, I mean, I'm looking at
 25 it as well. I don't think there's anything on

1 it that says it's a preliminary report. It
 2 looks like a requisition.
 3 MR. TROP: I'm just asking if it is.
 4 THE COURT: The doctor has it and he can
 5 characterize it however he thinks it should be
 6 characterized.
 7 MS. TEDDER: It in fact indicates that
 8 date to be done today, time to be done today.
 9 THE COURT: You can tell us what that is
 10 if you know.
 11 MS. TEDDER: Date to be done today.
 12 BY MR. TROP:
 13 Q. This is related to the CT scan; is that
 14 correct?
 15 A. Well, this is like a requisition for the
 16 department to do this particular study.
 17 Q. But you see how it's written on there,
 18 post-op changes, see report mucosal thickening of
 19 the maxillary sinuses, see that?
 20 A. Yes. I see that, but it's not sinus or I
 21 don't know who wrote that. For me it doesn't have
 22 any value.
 23 Q. It's in the chart, though, doctor. It's
 24 another thing relating to the CT scan where
 25 somebody didn't mention this ever important concha

1 Now, after, when the surgeon went into the sinuses,
 2 he found normal sinuses, so my opinion is that she
 3 developed sinusitis after the surgery, some time in
 4 1995.
 5 Q. Okay. Now that you brought that up, let
 6 me go to that.
 7 It almost sounded like a criticism. Were
 8 you actually criticizing Dr. Persky's operation of
 9 '89?
 10 A. Well, I am stating my opinion as far as
 11 the incidence of when she developed the chronic
 12 sinusitis.
 13 Q. You believe that Dr. Persky operated on
 14 her and it wasn't chronic sinusitis in 1989, it was
 15 acute sinusitis?
 16 A. That's what he wrote in the op report,
 17 that the sinuses were normal.
 18 Q. Now, you went over this, but I want to go
 19 over this again. This is the pathology report,
 20 correct?
 21 A. Correct.
 22 Q. It says pathology report.
 23 Now, it's signed by a doctor, you can't
 24 read his writing too well, but it looks like a W
 25 and J and C. William J. Colburn, probably, right,

1 bullosa, right?
 2 A. Like I said, I don't know who wrote this.
 3 MS. TEDDER: Objection.
 4 THE COURT: Sustained.
 5 BY MR. TROP:
 6 Q. If this concha bullosa was causing or
 7 contributing to Ms. French's sinusitis, how come
 8 she didn't have sinusitis before she started
 9 flying?
 10 A. Well, you know, again, you have to
 11 understand that in developing sinusitis, you know,
 12 you can have, you know, the allergies that could
 13 flare-up in a later date. You don't know exactly
 14 when the patient is going to develop or not develop
 15 sinusitis. That's something, if we had a crystal
 16 ball, then we would not have any sinusitis. We
 17 would treat it before it happens.
 18 Q. So you think that she had it before she
 19 started flying, the concha bullosa, but her
 20 allergies just didn't develop until she started
 21 flying?
 22 A. You've got to understand that the lady
 23 had an acute sinusitis in '89 and at that point she
 24 had medical treatment that was not very extensive.
 25 And then she had an operation for acute sinusitis.

1 who is the pathologist?
 2 MS. TEDDER: Objection, speculation.
 3 THE COURT: Yes, I mean --
 4 BY MR. TROP:
 5 Q. Whoever the pathologist was, I'm not sure
 6 I understood how you dispute that this was
 7 chronically inflamed tissue in the -- that the
 8 pathologist saw when he writes, numerous, sees
 9 numerous portions of subacute chronically inflamed
 10 respiratory epithelial lined mucosa. Is it your
 11 opinion that the pathologist is wrong about it
 12 being chronically inflamed?
 13 A. As I said before, the diagnosis of
 14 chronic sinusitis is not a pathological diagnosis.
 15 You don't look at the mucosa. It's a clinical
 16 diagnosis combined by a radiological diagnosis.
 17 But the pathologist has nothing to do with the
 18 accepted criteria utilized worldwide.
 19 Q. Why do we even need these crazy
 20 pathologists; is there some reason at all to look
 21 at the reports?
 22 A. You look at the report to see to make
 23 sure the patient didn't have a cancer or some other
 24 things that are important to the overall health of
 25 the patient. But you do not make a diagnosis of

1 chronic sinusitis based on the pathological
2 diagnosis. It's a clinical diagnosis.
3 Q. I just want to make sure. I understand
4 that -- what you're saying.
5 Are you disputing that this pathologist
6 found subacute chronically inflamed respiratory
7 cells? Are you disputing that it was chronic --
8 what he found was chronically inflamed?
9 MR. ENGRAM: Objection, misstates the
10 facts in evidence. It says subacute
11 chronically.
12 BY MR. TROP:
13 Q. I'm sorry, are you disputing that the
14 pathologist found subacute chronically inflamed
15 cells, tissue?
16 A. That's what he wrote.
17 Q. So you're not disputing that?
18 A. No.
19 Q. So I know that's not how you normally
20 make a diagnosis, but doesn't this prove that it
21 was chronic sinusitis since they found chronic --
22 subacute chronically inflamed tissue?
23 A. Absolutely not.
24 Q. And they found numerous portions of it?
25 That doesn't mean that?

1 A. Again, the diagnosis of chronic sinusitis
2 is not based on the pathological diagnosis, so it's
3 got no bearing in the definition or classification.
4 Q. Certainly you wouldn't diagnose sinusitis
5 based on the pathological report because you'd have
6 to do the surgery to diagnose?
7 A. Or you can do a biopsy, you don't have to
8 go and do a major surgery.
9 Q. Did the pathologist write anywhere in his
10 report acute tissue, acutely inflamed tissue?
11 MR. REILLY: Sure, it's right there. Put
12 it back up.
13 THE COURT: Okay. Let's not change the
14 words. We've seen it a whole bunch of times,
15 whatever it says subacute.
16 MR. TROP: I see subacute chronically
17 inflamed. Did the pathologist mention any
18 acutely inflamed tissue.
19 THE WITNESS: Subacute means that it was
20 acute at some point.
21 BY MR. TROP:
22 Q. Well, if it's chronic it was acute at one
23 point too?
24 A. Not necessarily, that's not right.
25 Q. Okay, but the pathologist does not

1 mention any acutely inflamed tissue, just subacute?
2 THE COURT: It's up there, we've seen it,
3 let's go to something else.
4 BY MR. TROP:
5 Q. One of the reasons why you believe
6 Ms. French, that her sinusitis was caused by other
7 things was because you believe her symptoms started
8 years after she was exposed to secondary smoke,
9 correct?
10 A. I'm talking about the symptoms related to
11 chronic sinusitis.
12 Q. I want to make sure, Ms. French told you,
13 didn't she, you met with her and you reviewed all
14 the records she had seen many other doctors before
15 she saw Dr. Persky, you're aware of that, aren't
16 you?
17 MS. TEDDER: Objection, Your Honor.
18 THE COURT: Sustained.
19 Could you be more specific, please?
20 BY MR. TROP:
21 Q. Are you aware if Ms. French had seen
22 otolaryngologists before she saw Dr. Persky?
23 MS. TEDDER: Same objection.
24 THE COURT: What's your objection?
25 MS. TEDDER: Well, we have what we have

1 here, these records.
2 THE COURT: He can answer. I don't know
3 if he's aware or not, I don't know if she did
4 or not. But you can ask him.
5 THE WITNESS: Well, I'm aware that the
6 first, there was a partner to Dr. Persky that
7 saw her a little before. Also saw I think
8 Dr. Traxler that wrote like an excuse from
9 work who wasn't an otolaryngologist, although
10 there were no records or anything that would
11 give any accurate information.
12 BY MR. TROP:
13 Q. But you would want to know, so I
14 understand the record. Is it your understanding
15 the records from Dr. Traxler and Dr. Madey and
16 Dr. Paddy have been destroyed?
17 A. Nobody told me that, just that they were
18 so old that I assume most likely they have been
19 destroyed.
20 Q. But did you ask, you met so many hours
21 with these tobacco lawyers, did you ask what their
22 understanding was of the treatment she got overall
23 those years before she saw Dr. Persky?
24 MS. TEDDER: Objection, Your Honor.
25 THE COURT: Sustained.

1 BY MR. TROP:

2 Q. You said you reviewed Ms. French's
3 deposition, right?

4 A. Some time ago, yes.

5 Q. And you spent a lot of hours reading it,
6 right? We saw the bills for it?

7 A. Yes.

8 Q. Because it was long.

9 Did you remember what she said about all
10 the treatment she got from those doctors in her
11 deposition in the '70s and '80s?

12 A. Well, I don't recall every detail of the
13 deposition because it was very long. I would have
14 to review it all over again.

15 Q. Okay. But you're not saying that the
16 first medical treatment Ms. French got for her
17 sinusitis was from Dr. Persky, that's not your
18 understanding, is it?

19 A. Well, from my -- I mean, I have to go by
20 the records that I had available. If I had all the
21 records, I could review them, that would be
22 fantastic, except that I don't have that benefit.

23 Q. That's a problem for everybody, but you
24 understand just because the records don't exist
25 anymore doesn't mean it didn't happen. I mean, you

1 Dr. Traxler, Dr. Madey or Dr. Paddie.

2 MS. TEDDER: Objection.

3 THE COURT: Okay. Is there any evidence
4 in this record about that?

5 MR. TROP: We don't have the records,
6 that's the problem.

7 THE COURT: Then I'll sustain the
8 objection.

9 BY MR. TROP:

10 Q. Different question. If she saw the
11 combination of Dr. Traxler, Dr. Madey and
12 Dr. Paddie for 10 years before she even saw
13 Dr. Persky, would you be critical of them too for
14 not ordering allergy testing?

15 MR. REILLY: Objection, Your Honor.

16 THE COURT: Sustained. Sustained.

17 BY MR. TROP:

18 Q. What's your understanding, doctor, of
19 what Ms. French went through in the late '70s and
20 early '80s before she started seeing Dr. Persky?

21 THE COURT: That's a little vague.

22 BY MR. TROP:

23 Q. Physically as far as her sinuses go?

24 A. I mean, I don't understand the question.

25 Q. Well, in the late '70s -- you know she

1 know she saw many doctors before Dr. Persky, don't
2 you?

3 MS. TEDDER: Objection, Your Honor. He's
4 asked this question five times in an attempt
5 to get the answer he wants.

6 THE COURT: I think it's repetitious.

7 BY MR. TROP:

8 Q. You made some points about lack of
9 allergy testing, right? You think she needs an
10 allergy test?

11 A. Yes, I do.

12 Q. Do you know whether any of her previous
13 doctors gave her an allergy test one way or
14 another?

15 A. From the review of the records and the
16 history that I obtained, it didn't seem that she
17 ever had any kind of allergy testing done.

18 Q. So you don't know, I just want to make
19 sure, you don't know whether Dr. Traxler, Dr. Madey
20 or Dr. Paddy ever did any allergy testing on her,
21 right?

22 A. I know Dr. Persky never did, because it
23 was recommended in the chart.

24 Q. I know you understand that. I'm not
25 asking about Dr. Persky, I'm asking you about

1 started flying in 1976, right?

2 A. Yes.

3 Q. What kind of problems, if any, did she
4 have with her sinuses in the late '70s and early
5 '80s before she went to see Dr. Persky?

6 A. Like I said, I don't have the benefit of
7 the records before, but in my specialty we must be
8 extremely careful when the patient gets the
9 so-called diagnosed sinusitis by the general doctor
10 or family doctor who a lot of times will diagnose
11 any kind of upper respiratory tract infection, such
12 as the common cold as sinusitis and especially if
13 the patient has not been seen by an ENT. We
14 usually don't put a lot of stock on the diagnosis
15 of sinusitis. A lot of times they will just call
16 anything sinusitis.

17 Q. But my question is completely different.
18 What was your understanding of what her problems
19 were in any of her sinuses in the late '70s and
20 early '80s?

21 THE COURT: Are you asking for symptoms?

22 MR. TROP: Yes, symptoms.

23 MS. TEDDER: Objection, Your Honor.

24 THE COURT: Overruled.

25 If you know this from what you reviewed.

1 THE WITNESS: I don't know.

2 BY MR. TROP:

3 Q. Wouldn't it be important to you to know
4 in determining whether it was in 1989 chronic
5 sinusitis or acute sinusitis to know what problems
6 she had for the previous 10 years?

7 A. Well, based on it's history and on the
8 records I reviewed, the first time that the patient
9 gets properly diagnosed of sinusitis is when in
10 1999 --

11 THE COURT: You mean '89.

12 THE WITNESS: 1989 when she gets refer he
13 to the ENT. Prior to that it's my experience
14 that we need to be extremely careful with the
15 diagnosis of sinusitis that comes from either
16 internal medicine or general doctor because a
17 lot of times they will over diagnose sinusitis
18 without performing the appropriate testing or
19 appropriate examination.

20 BY MR. TROP:

21 Q. So Dr. Persky misdiagnosed chronic
22 sinusitis and if anybody else made that same
23 diagnosis they were wrong, right?

24 MR. REILLY: I'm going to object, Your
25 Honor.

1 A. False.

2 Q. Are you aware of any literature that says
3 that?

4 A. Yes, I am.

5 Q. Okay. So you are aware of scientific
6 literature that says direct smokers face an
7 increased risk --

8 THE COURT: I think the question was
9 unclear. When you said, do you know of any
10 literature that says that, were you talking
11 about Dr. Torres's opinion or the opposite
12 opinion?

13 MR. TROP: I'm butchering this, Judge.
14 Let me back up.

15 BY MR. TROP:

16 Q. Are you aware of scientific literature
17 that says cigarette smokers face a higher risk of
18 sinusitis?

19 A. I'm aware of perhaps one paper that
20 addresses that possible variable. And it was not
21 statistically significant. Plus the fact that my
22 19 years of experience as an ear, nose and throat
23 surgeon I see a lot of patients who smoke, never
24 have sinusitis. And I see a lot of patients who
25 don't smoke who have sinusitis.

1 THE COURT: Sustained.

2 But can we please have Ms. Tedder do the
3 objections?

4 BY MR. TROP:

5 Q. Doctor, I want to ask you some general
6 questions about flight attendants and what they're
7 exposed to.

8 First of all, you agree that for smokers,
9 direct smokers, there's an increased risk of
10 sinusitis; you know the studies show that, right?

11 MS. TEDDER: Objection, Your Honor.

12 THE COURT: Overruled.

13 You may answer.

14 THE WITNESS: Which study are you talking
15 about?

16 BY MR. TROP:

17 Q. Studies in general. I'm asking you --
18 forget the studies part -- I'm asking you: You
19 understand, don't you, that direct --

20 MS. TEDDER: Objection.

21 MR. TROP: Let me rephrase it, Judge.
22 I'm mangling this.

23 BY MR. TROP:

24 Q. Direct smokers face an increased risk of
25 sinusitis, true or false?

1 So in my opinion it's got little, very
2 little impact on the disease.

3 Q. If a person is exposed to environment
4 smoke, secondhand smoke in a car it will cause some
5 respiratory illnesses; is that correct?

6 MR. REILLY: Your Honor --

7 MS. TEDDER: Objection.

8 THE COURT: Sustained.

9 I mean, you might have to define what you
10 mean by respiratory illnesses in particular,
11 since we're talking about chronic sinusitis.
12 We have to know whether that's included or not
13 included.

14 BY MR. TROP:

15 Q. Doctor, earlier we talked about the
16 person at the other end of the room smoking and
17 maybe not affecting someone at this end of the
18 room. Can you think of a class of people that were
19 exposed to as much secondhand smoke as flight
20 attendants were during the time when they allowed
21 smoking on airplanes?

22 A. A class of people?

23 Q. Yes, type of people. In an occupation or
24 anything like that?

25 A. I guess bartenders, you know.

1 Q. Maybe bartenders, but of course, they can
2 walk in and out.
3 A. No, they're standing there serving drinks
4 and stuff.
5 Q. You agree, though, if someone is going to
6 get sick from secondhand smoke, develop chronic
7 sinusitis, it would be a flight attendant, because
8 they have the most exposure to secondhand smoke?
9 MS. TEDDER: Objection, Your Honor.
10 THE COURT: Sustained.
11 BY MR. TROP:
12 Q. Are there any circumstances, doctor,
13 where you will -- there are any circumstances where
14 you will agree that secondhand smoke causes chronic
15 sinusitis?
16 A. No.
17 Q. None. So you could take two tubes like
18 the size of a pencil, hollow tubes, and put them up
19 a person's nose and pump secondhand smoke up that
20 person's nose for an hour and they would not get --
21 MS. TEDDER: Objection, Your Honor.
22 THE COURT: Overruled.
23 Go ahead, you may finish your question.
24 BY MR. TROP:
25 Q. They would not get chronic sinusitis?

1 BY MR. TROP:
2 Q. So two weeks a year, whatever, under no
3 circumstances if you shoved enough secondhand smoke
4 up someone's nose, would they get chronic
5 sinusitis, right?
6 A. I already answered that.
7 Q. And you base that because you haven't
8 seen an article indicating that secondhand smoke
9 causes chronic sinusitis?
10 A. Like I said, you know, in my 19 years as
11 a board-certified otolaryngologist I treated
12 thousands of patients who smoke and they don't have
13 any sinusitis.
14 And the same token, I examined thousands
15 of patients who don't smoke and they come out with
16 chronic sinusitis. That kind -- that's the reason
17 why I make my opinion.
18 Q. And you are certainly not aware of any
19 studies done on flight attendants, nonsmoking
20 flight attendants to determine whether they are
21 posed with a greater risk of chronic sinusitis?
22 A. I'm not.
23 Q. Would that be helpful if you could
24 conduct such a study?
25 MR. REILLY: Objection, Your Honor. No

1 A. Secondary smoke is not a known etiology
2 in American or worldwide as far as sinusitis is a
3 concern. You're talking about an aberrant
4 behavior, which is not normal. That is something
5 that I cannot answer.
6 Q. The question was about my hypothetical.
7 You can't answer the question whether they would
8 get --
9 MS. TEDDER: Objection.
10 MR. TROP: He didn't answer it.
11 MS. TEDDER: I think he did answer it and
12 I think he's trying to tell him it's
13 impossible.
14 THE COURT: I think he did answer the
15 question.
16 BY MR. TROP:
17 Q. If you took that same system and exposed
18 someone to two weeks of cigarette -- secondhand
19 smoke into their nostrils --
20 MS. TEDDER: Objection, Your Honor.
21 BY MR. TROP:
22 Q. Would that person be susceptible to
23 chronic sinusitis from the secondhand smoke?
24 THE COURT: You may answer.
25 THE WITNESS: No.

1 good faith basis for this. There is no such
2 study.
3 THE COURT: You weren't implying that
4 there was, were you?
5 MR. TROP: No, I don't think there is
6 one. I'm asking if such a study were
7 performed if that would be helpful to
8 determine whether secondhand smoke causes
9 chronic sinusitis.
10 THE COURT: You may answer.
11 THE WITNESS: Well, the research that
12 goes on, chronic sinusitis has always been
13 focusing in a reason that make a lot more
14 sense than that one in particular. Especially
15 now that flight attendants are not even
16 exposed to smoking on airplanes.
17 BY MR. TROP:
18 Q. Did you ever ask to examine other people
19 that had been exposed to the same circumstances
20 Lynn French did?
21 A. I'm sorry.
22 Q. Did you ever ask to examine any other
23 flight attendants that were exposed to the same
24 conditions that Lynn French did?
25 MS. TEDDER: Objection.

1 THE COURT: Sustained.
 2 Don't answer.
 3 MR. TROP: May I just have one moment?
 4 THE COURT: All right.
 5 BY MR. TROP:
 6 Q. Doctor, you mentioned earlier that you, I
 7 think you said you were board-certified?
 8 A. Yes, I am.
 9 Q. What's the name of the board that
 10 certified you?
 11 A. American Board of Otolaryngology.
 12 Q. And that's a significant organization,
 13 right? In other words, it's not just one of these
 14 where you can pay a fee and become a member?
 15 That's your governing board, right?
 16 A. Yes.
 17 Q. And they establish guidelines and things
 18 like that for otolaryngologists?
 19 A. Yes.
 20 Q. And they administer the tests and they
 21 train otolaryngologists, right?
 22 A. Yes.
 23 Q. Do you consider them to be an
 24 authoritative source?
 25 A. For what?

1 Q. On the issue of tobacco smoke and chronic
 2 sinusitis?
 3 MS. TEDDER: Objection, Your Honor. I
 4 think -- there may be a confusion here by
 5 counsel between the American Board of
 6 Otolaryngology, which is what I think
 7 Dr. Torres was referring to.
 8 THE COURT: You're asking whether the
 9 American Board of Otolaryngology is an
 10 authoritative source?
 11 MR. TROP: Yes.
 12 THE COURT: On the connection, if any,
 13 between smoking and chronic sinusitis?
 14 MR. TROP: Secondhand smoke.
 15 THE COURT: Secondhand smoke and chronic
 16 sinusitis.
 17 THE COURT: You may answer.
 18 THE WITNESS: The American Board of
 19 Otolaryngology is basically an organization
 20 that establishes the minimal credentials to
 21 certify as a specialty those people -- those
 22 doctors who have finished their residency.
 23 They basically administer the written and
 24 oral tests and they send us certificates.
 25 They are not into policy making or making

1 public statements in regards to anything.
 2 They are basically just there to test the
 3 potential physicians and certify them that
 4 they pass the test.
 5 BY MR. TROP:
 6 Q. So do you consider them to be an
 7 authoritative source or not?
 8 MS. TEDDER: Objection, Your Honor.
 9 THE COURT: Sustained. I think he says
 10 that they don't make pronouncements or
 11 findings.
 12 BY MR. TROP:
 13 Q. Well, they issue guidelines, don't they?
 14 MS. TEDDER: It mischaracterizes his
 15 testimony.
 16 THE COURT: Anyway, do they issue
 17 guidelines?
 18 THE WITNESS: No, they perform tests and
 19 they certify the physicians. Talking about
 20 the American Board --
 21 BY MR. TROP:
 22 Q. Has the board, the American Academy of
 23 Otolaryngology?
 24 THE COURT: See, that's the distinction.
 25 You're talking about the American Academy

1 rather than the American Board. Is there some
 2 difference between those two?
 3 BY MR. TROP:
 4 Q. Is the American Academy of Otolaryngology
 5 an authoritative source?
 6 A. Well, a lot of times they behave like an
 7 authoritative source and sometimes they make public
 8 health pronouncements that are for general health
 9 information that are not considered authoritative.
 10 Q. Well, do you know if the Academy -- the
 11 American Academy of Otolaryngology has taken an
 12 opinion, has taken a position on whether exposure
 13 to cigarette smoke interferes with the natural
 14 sweeping action of the cilia?
 15 A. Well, I know that the American Academy
 16 has some web pages where they give general health
 17 advice and they make sweeping or superficial
 18 statements that are in my opinion not authoritative
 19 for -- they're not acting in an authoritative --
 20 sorry, I have a problem with that word -- capacity.
 21 Q. So you know what I'm talking about then,
 22 you're saying that on its web site the Am --
 23 MR. REILLY: Objection, Your Honor.
 24 MS. TEDDER: Objection.
 25 THE COURT: Sustained.

1 BY MR. TROP:

2 Q. So with respect to their position on the
3 effects of secondhand smoke on the cilia they are
4 not authoritative?

5 MR. REILLY: Objection, Your Honor.

6 MR. WEINSTEIN: You told him not to get
7 up.

8 THE COURT: Overruled. You may answer.

9 THE WITNESS: Can you repeat the question
10 please?

11 BY MR. TROP:

12 Q. Yes. With respect to their position on
13 the effect of secondhand smoke on the sweeping
14 action of the cilia, is it your testimony that the
15 American Academy of otolaryngologists is not
16 authoritative?

17 MS. TEDDER: Objection, Your Honor.

18 THE COURT: I don't see a problem with
19 this question.

20 MS. TEDDER: No evidence of what he's
21 referring to.

22 THE COURT: Well, if you can answer the
23 question, please do.

24 THE WITNESS: Well, I would have to read,
25 you know, because he hasn't really explained

1 I'm just going to forget about it.

2 THE COURT: Okay, so then do you have
3 much more?

4 MR. TROP: Five minutes.

5 THE COURT: So then we have redirect.
6 Five minutes more for cross. And how are we
7 going for redirect; do you know?

8 MS. TEDDER: We don't have that much,
9 Your Honor.

10 THE COURT: Would we be able to do the
11 video also?

12 MR. WEINSTEIN: We think we can overcome
13 any slight little problem, judge. As I
14 understand it there are a few words.

15 MR. REILLY: Three spots.

16 THE COURT: Can't you just turn off the
17 sound?

18 MR. WEINSTEIN: He said he can do it.
19 He's done it 100 times. And there's no
20 problem.

21 THE COURT: I think that's fine.

22 MR. WEINSTEIN: She's reviewed it with
23 him and you'll have a court reporter so that
24 there's no problem.

25 THE COURT: I think we should do it that

1 exactly what he's talking about.

2 THE COURT: Maybe what we could do is
3 take a break, we're going to take a break any
4 way and there's some coffee waiting for the
5 jurors and we can iron this out.

6 So could the jurors go to the jury room
7 and I'll ask counsel to remain.

8 (Jury exits courtroom.)

9 THE COURT: Dr. Torres would like to take
10 a break now. I think when we come back before
11 the jury comes back maybe you can show him or
12 show counsel or something what it is you're
13 referring to, see if Dr. Torres recognizes it
14 as an authoritative source and then we can
15 proceed. Why don't we take about 10 minutes.

16 MR. REILLY: Your Honor, before we, so we
17 don't have another one of these questions,
18 what's impermissible is to say.

19 THE COURT: We're going to meet before
20 the jury comes back in 10 minutes.

21 (A recess was taken.)

22 THE COURT: Okay. Have a seat, everyone.
23 I think I remember where we were. Did
24 you show Defendant --

25 MR. TROP: He hasn't been around. But

1 way.

2 Anyway let's finish.

3 MR. WEINSTEIN: Judge, I know you think I
4 can't do anything, briefly, I want to try my
5 best. I want to renew our motion for mistrial
6 on the basis of the testimony of Dr. Torres
7 clearly sandbagging the Plaintiffs. In his
8 deposition and in his report he does not
9 mention anything about blaming the causation
10 of the Plaintiff's sinusitis on Dr. Persky.
11 He just gave his opinion, it can't cause it.
12 Basically that's what he said.

13 Now we come -- he comes to trial and he
14 blames Dr. Persky for the sinusitis, clearly.

15 THE COURT: Was he asked about this on
16 deposition?

17 MR. REILLY: Your Honor, this is
18 completely inaccurate on the Plaintiff's part,
19 because in the report that Dr. --

20 MR. WEINSTEIN: Let me finish, judge.

21 THE COURT: You've already made your
22 point before. And all you're doing is
23 repeating exactly what you said before.

24 MR. WEINSTEIN: But I have to mention
25 Fabre. This is a clear violation of Fabre.

1 THE COURT: You argued this before. I've
2 heard it. I don't have to hear it again. If
3 you have something new to say, I'd certainly
4 give you an opportunity. But to say something
5 twice, it's not necessary. I've ruled.

6 I don't know what he was asked in his
7 deposition. Did you ask him any questions
8 about the surgery that Dr. Persky performed?

9 MR. WEINSTEIN: We asked his opinion.

10 MR. REILLY: Your Honor, it's right in
11 the report about the synechia. It's right in
12 the report.

13 THE COURT: What does it say in the
14 report?

15 Did you find it?

16 MR. REILLY: Yes, he says right in it,
17 now, they may not have asked him what was
18 synechia because they may not have known to
19 ask him that, I don't know. But it says:
20 Could not find a large middle meatal window
21 posterior to that -- he's talking about
22 finding the accessory on the right maxillary.
23 Then he says there was a small synechia at the
24 tip of the right middle turbinate and a small
25 amount of purulent discharge on the small and

1 MS. TEDDER: That was in Dr. Persky's
2 operative report. No evidence of disease, no
3 evidence of -- the first surgeon, this is
4 Dr. Torres's IME. The surgeon did not find
5 acute sinus disease or upon entering the
6 maxillary again, he did not find fluid and the
7 maxillary sinuses were found to have normal
8 mucosa. That's in the operative report.
9 That's in Dr. Persky's IME.

10 MR. REILLY: In addition to that --

11 THE COURT: I'll deny the motion for
12 mistrial. And you're withdrawing the
13 questions that we were going to discuss. So
14 let's move along.

15 (Jury enters courtroom.)

16 THE COURT: Have a seat, please. We'll
17 continue with the cross examination of
18 Dr. Torres.

19 BY MR. TROP:

20 Q. Dr. Torres, we've already discussed how
21 in October of last year after examining Ms. French
22 you issued -- you wrote a report, a four-page
23 report about your findings?

24 A. Yes, I did.

25 Q. And you've had a chance to review it a

1 antrostomy. That's all he's testified to here
2 today.

3 THE COURT: What is this synechia?

4 MR. REILLY: The scarring from the
5 surgery performed from Dr. Persky. If it's
6 right there for you to read, but you don't ask
7 him about it, you can't blame us for that.

8 THE COURT: That is what he said. That
9 if Dr. Persky found it, which was the natural
10 ostium as far as I understand on the right
11 side, the scarring may have occluded what he
12 did.

13 MR. TROP: He said he shouldn't have done
14 the surgery that caused the scarring, that's
15 not in his report.

16 MS. TEDDER: He said scarring could be a
17 natural complication.

18 MR. TROP: Right. But he shouldn't have
19 done the surgery that caused the natural
20 complication.

21 THE COURT: Okay. The opinion that --
22 then he shouldn't have done the surgery.

23 MR. TROP: He said he shouldn't have done
24 the surgery because it wasn't chronic
25 sinusitis.

1 little today and certainly over time, right?

2 A. Yes, I did.

3 Q. And this report essentially I know there
4 might be little things in it that are maybe
5 missing, but essentially this report is what your
6 opinions are, right?

7 A. Yes.

8 Q. Is there -- is there another report?

9 MR. REILLY: Objection, Your Honor.

10 THE COURT: What do you mean is there
11 another report?

12 MR. REILLY: I object, Your Honor.

13 BY MR. TROP:

14 Q. Was there a different draft of this
15 report?

16 A. No.

17 Q. You didn't send it to the -- to Shook
18 Hardy and then make changes after that to the
19 report?

20 A. No.

21 Q. Okay. I'm hoping, I'm -- let me show
22 you -- let me show Ms. Tedder.

23 Doctor, let me just ask you, maybe you
24 can explain what this is. This appears -- tell me,
25 do you recognize this document?

1 A. Yes.
 2 Q. Is this your handwriting?
 3 A. Yes.
 4 Q. Can you just read that for the jury?
 5 A. This is the correct report of this
 6 patient.
 7 Q. Is this Lorraine O'Neil again at Shook
 8 Hardy, right?
 9 A. Yes.
 10 Q. October 12th of 2001?
 11 A. Yes.
 12 Q. What does this refer to?
 13 A. The report that we produced here was sent
 14 to them after some typographical errors were
 15 corrected.
 16 Q. So there was a different draft of the
 17 report?
 18 A. Well, there was a different draft. I
 19 don't recall if it was ever sent. I mean, I wanted
 20 to make sure that that was the official one, the
 21 one that I sent at that point.
 22 Q. I just want to make sure I and the jury
 23 understand. You underlined the word correct. Was
 24 there at some point a different or incorrect report
 25 that you sent to the lawyers at Shook Hardy?

1 Q. Bu
 2 before you
 3 okay if you
 4 MR
 5 times,
 6 doing i
 7 TH
 8 MR
 9 TH
 10 has be
 11 Do you
 12 BY MR.
 13 Q. I would ask the doctor if you have an
 14 independent recollection, if you made certain
 15 corrections or if you actually sent to them a
 16 previous report?
 17 MR. REILLY: It's been asked and answered
 18 three times.
 19 THE COURT: It has been asked and
 20 answered.
 21 MR. WEINSTEIN: Your Honor --
 22 THE COURT: I think you can refer to the
 23 transcript.
 24 BY MR. TROP:
 25 Q. Doctor, finally, with respect to your

1 A. Well, the reports, I would dictate a
 2 report and it would get transcribed by the person
 3 who writes my letters. Then I have to make several
 4 corrections because a lot of times people have
 5 typographical errors. And at that point I will
 6 send it back to the transcriber until I get the
 7 final corrected, kind of free of errors report. At
 8 that point that's when I submit it.
 9 Q. But see, what I'm confused about is
 10 you're sending to Shook Hardy a letter saying this
 11 is the correct report for this patient. Doesn't
 12 that imply that you maybe sent them a report first
 13 and they alerted you to something that was
 14 incorrect?
 15 A. Well, I don't remember exactly, you know,
 16 the specifics. I want to make sure with that note
 17 it was after I had corrected the transcribing
 18 errors that my transcriber commits, which
 19 occasionally are quite a few, which that was my
 20 final report.
 21 Q. A lot of people that dictate from time to
 22 time see typographical errors. Is it fairly common
 23 to have to go through and change a little thing
 24 here or there on a typographical error?
 25 A. Yes.

1 report, it's four pages, right?
 2 Did you use an endoscope in your
 3 examination of Ms. French?
 4 A. Yes, I did.
 5 Q. Throughout the four pages, I didn't see
 6 the word endoscope anywhere. Do you want to look
 7 to see if you used it, the word?
 8 A. I'll be happy to look, but I always write
 9 a separate page or report that is not, that is part
 10 of the general chart of the patient and that's
 11 where I write my description of the endoscopic
 12 exam.
 13 Q. My question is: Just because you didn't
 14 use the word endoscope, that doesn't mean you
 15 actually didn't use an endoscope to examine her?
 16 A. Number one, I would have to review the --
 17 read the report again. But I would refer you to
 18 the endoscopic form standard operative note that is
 19 a part of every patient.
 20 MS. TEDDER: Objection, Your Honor.
 21 Counsel is mischaracterizing the report. It
 22 specifically says at the bottom of page 2,
 23 last paragraph, intranasal examination was
 24 performed fiberoptic, which is exactly what
 25 the doctor has explained with the endoscopy.

1 THE COURT: When you say fiberoptic, does
2 that mean endoscope?

3 BY MR. TROP:

4 Q. That's my question. Simply because you
5 didn't use the word endoscope, doesn't mean you
6 didn't use an endoscope?

7 MS. TEDDER: Objection, Your Honor.

8 THE COURT: I'll sustain the objection if
9 fiber optic is the same as endoscope.

10 MR. TROP: That's the point of my
11 question.

12 BY MR. TROP:

13 Q. Thank you very much, doctor.

14 THE COURT: Redirect.

15 REDIRECT EXAMINATION

16 BY MS. TEDDER:

17 Q. - Dr. Torres, I want to touch on a few
18 points that Mr. Trop touched on in his examination
19 of you.

20 He spent some time going over your bills
21 in this case. And my question to you is:
22 Regardless of how much you have been paid in this
23 case, does it affect your opinion in any way?

24 A. No.

25 Q. And was your objective in this case to

1 Q. Based upon your own patient population,
2 doctor, is there any greater incidence of sinusitis
3 in smokers than in nonsmokers?

4 A. No.

5 Q. Mr. Trop spent a little bit of time
6 talking about irritants. Are irritants thought to
7 cause chronic sinusitis?

8 A. No.

9 Q. He also showed you a study, which I will
10 show you again just briefly. He showed you a study
11 that talked about the effects of the cilia. And
12 I'll just show you this so that we're on the same
13 page. Did he show you this study --

14 A. Yes.

15 Q. -- and ask you about the cilia?

16 All right.

17 Now, this study that he showed you, that
18 study, does that indicate that environmental
19 tobacco smoke causes chronic sinusitis?

20 A. No.

21 Q. Let's talk a little bit about something
22 else that he showed you. And I'm going to hand you
23 back the records from Dr. Persky.

24 He also talked to you about the records
25 that you reviewed, but you didn't review just the

1 come and to try to tell the jury to the best of
2 your ability what was going on in this case?

3 A. Yes.

4 Q. Some of the time in your bills are for
5 preparing for depositions, for example, depositions
6 taken by Mr. Weinstein's firm, correct?

7 A. Correct.

8 Q. And Mr. Trop showed you a specific bill
9 dated 5-24-02 and it talked about trial
10 preparation; do you recall seeing that?

11 A. Yes.

12 Q. And that wasn't trial preparation for
13 today; is that correct?

14 A. Correct.

15 Q. Isn't it a fact that this case has been
16 continued several times, so you got ready for trial
17 and we didn't go to trial; is that correct?

18 A. Correct.

19 Q. And as a result you've had to refresh
20 your recollection of the records; is that correct?

21 A. Correct.

22 Q. The bills that you -- that he went over
23 with you, those are actually for two cases, not
24 just the French case, correct?

25 A. Correct.

1 records of Dr. Persky in this case, did you; you in
2 fact, have all of the medical records, correct?

3 A. Correct, correct.

4 Q. That we have?

5 A. Correct.

6 Q. For whatever period of time they exist,
7 correct?

8 A. Correct.

9 Q. I'm going to hand you back that copy of
10 Dr. Persky's medical records. And I want to ask
11 you a couple of questions about that. If you turn
12 to page 29. That was the report of the
13 pathologist. Do you recall this?

14 A. Yes, I do.

15 Q. Do you have just a copy to put up, Barb.
16 Just to refresh your recollection, it's
17 page 29.

18 If we take a look at page 29, this is the
19 report of the pathologist from September 20, 1989,
20 correct?

21 A. Correct.

22 Q. And Mr. Trop spent some time with you
23 talking about certain of the words in this report,
24 specifically subacute and chronic, correct?

25 A. Correct.

1 Q. Now, you told us earlier that chronic
2 sinusitis is a clinical diagnosis and not a
3 diagnosis that's made by a pathologist; is that
4 correct?

5 A. Correct.

6 Q. And tell us again why it is a clinical
7 diagnosis and not a diagnosis made by a
8 pathologist.

9 A. Because of reclassification, which was a
10 major convention of doctors and professors
11 determined that basically you diagnose the chronic
12 sinusitis based on the clinical symptoms of the
13 patient, the duration the endoscopic exam and the
14 results of the CAT scan. And the pathologist had
15 no importance on the diagnosis.

16 Q. And the pathologist doesn't have all of
17 those. All he's doing is looking at some tissue,
18 correct?

19 A. Correct.

20 Q. And the pathologist doesn't know, for
21 example, what you told us about the physical
22 symptoms of the patient; he doesn't know what those
23 are when he's looking at some tissue, correct?

24 A. That's correct.

25 Q. He doesn't know the particular conditions

1 THE COURT: Sustained.

2 BY MS. TEDDER:

3 Q. Chronic -- he also talked to you a little
4 bit about the records in this case. And you
5 mentioned Dr. Traxler; do you recall that?

6 A. Yes.

7 Q. I'm going to show you what's been marked
8 as page 1666 out of 1950, I think is the same set
9 of records. And also page 162 out of that same
10 exhibit. Let's just take a look at what we do have
11 about Dr. Traxler. And we don't have all his
12 records, correct?

13 A. Correct.

14 Q. But what we do have is a letter dated
15 November 2nd, 1987; do you see that?

16 A. Yes, I do.

17 Q. He is referencing Lynn Haines and there's
18 been testimony in this case that that was
19 Ms. French's prior name; do you recall that?

20 A. Yes.

21 Q. All right. Now, Dr. Traxler in 1987, can
22 you read what he says about her sinusitis?

23 Maybe we can bring that in just a little
24 bit closer to zoom in a little bit in the second
25 line.

1 of this patient, correct?

2 A. Correct.

3 Q. And he doesn't know whether the
4 conditions of that patient have changed over time,
5 correct?

6 A. Correct.

7 Q. And in this particular instance, you told
8 us about -- that the fact that about two weeks
9 before this, Ms. French had had the air-filled
10 cavity, correct?

11 A. Correct.

12 Q. And that you told us was a hallmark sign
13 of what?

14 A. Acute sinusitis.

15 Q. And that's something that the pathologist
16 wouldn't know, correct?

17 A. Correct.

18 Q. But that's something that the treating
19 physician should know, correct?

20 A. Correct.

21 Q. And he takes that into account in making
22 his diagnosis?

23 A. Correct.

24 MR. TROP: Your Honor, we object on
25 leading.

1 A. It says: Examination revealed acute
2 sinusitis, compounded by serous otitis media
3 bilaterally.

4 Q. So in 1987 Dr. Traxler thought it was
5 acute sinusitis, correct?

6 A. Correct.

7 Q. And let's take a look at the record of
8 Dr. Madey, the only record that we have. And this
9 is, certificate to return to work. And that is
10 dated 1-3-89; do you see that?

11 A. Yes, I do.

12 Q. It's very hard to read at the bottom, but
13 it said Edward Madey. It says, sinus infection.
14 Can you read what the middle line says there about
15 what he says about her illness?

16 A. Acutely ill.

17 Q. So at that point in time he thinks her
18 condition is an acute one; is that correct?

19 A. Correct.

20 Q. Now, we do have the records from 1989
21 forward. Correct? Her records of Dr. Persky?

22 A. Correct.

23 Q. Now, can you look at the record from that
24 point in time forward, 1989 forward and determine
25 Ms. French's condition, which is what you talked to

1 us about earlier from 1989 forward?
 2 A. Yes, she had acute sinusitis.
 3 Q. And that's what those records indicate,
 4 correct?
 5 A. Correct.
 6 Q. All right. Mr. Trop asked you whether or
 7 not you thought the concha bullosa that you talked
 8 about on direct exam -- whether or not you thought
 9 that was important.
 10 A. Correct.
 11 Q. Do you recall that? And you said it was?
 12 A. Yes.
 13 Q. Do you know whether or not Dr. Persky
 14 thought that that concha bullosa and determining
 15 whether or not that affected her condition was
 16 something that should be done?
 17 MR. TROP: Objection, Your Honor.
 18 THE COURT: Why?
 19 MR. TROP: Relevance and prior reason
 20 expressed at sidebar.
 21 THE COURT: Overruled.
 22 BY MS. TEDDER:
 23 Q. Let's just take a look at -- and I'd ask
 24 you to take a look, doctor, at the set of records
 25 that you have, page 00088 of this set of records.

1 There's an entry there that's dated 1-23-02.
 2 Barb, can you put that up and then
 3 highlight that whole entry for us?
 4 This is again from Dr. Persky's records;
 5 do you recall?
 6 A. Yes, I do.
 7 Q. Now, let's take a look at what
 8 Dr. Persky's records said.
 9 Can you just read over there? It says --
 10 can you read that?
 11 A. It says: Deposition of Mrs. French case.
 12 Recommend.
 13 Q. Reevaluate --
 14 A. Re-evaluation of CAT scan, CT.
 15 Q. CT means CAT scan?
 16 A. Concha bullosa, immunology, allergy work
 17 up. Is it contributing to current status?
 18 Q. So that's what Dr. Persky thought in
 19 January of 2002, correct?
 20 A. Correct.
 21 Q. And you think it's important, just like
 22 Dr. Persky, to re-evaluate and have a new CT scan,
 23 correct?
 24 MR. TROP: Objection, leading.
 25 THE COURT: Sustained.

1 BY MS. TEDDER:
 2 Q. Let me ask you, do you agree with what
 3 Dr. Persky says here should be done, a
 4 re-evaluation?
 5 A. Yes, I do.
 6 Q. So Dr. Torres, it would be true that
 7 you're not the only person who thinks it's
 8 important to take a look at things like
 9 Mrs. French's concha bullosa, have her tested for
 10 allergies and re-evaluate her condition, correct?
 11 MR. TROP: Objection, leading.
 12 THE COURT: It is leading and also
 13 repetitious.
 14 BY MS. TEDDER:
 15 Q. Dr. Torres, isn't it true that Dr. Persky
 16 recommends here a re-evaluation of Mrs. French to
 17 determine whether or not those things, the concha
 18 bullosa, her allergies, have a new CT scan, all to
 19 determine whether or not those things are
 20 contributing to her current status?
 21 MR. TROP: Objection, leading.
 22 THE COURT: Sustained.
 23 BY MS. TEDDER:
 24 Q. That's what this record says?
 25 A. Yes.

1 MS. TEDDER: I think that's all I have.
 2 THE COURT: Okay. You can be excused.
 3 (Witness excused.)
 4 THE COURT: Okay, while Dr. Torres is
 5 getting his equipment there. I think we're
 6 going to return now to the Plaintiff's case
 7 with a video. Which I don't think is too
 8 long. Do we know how long it is? About half
 9 an hour.
 10 MS. WEINSTEIN: Closer to 45 minutes,
 11 Your Honor.
 12 THE COURT: So that will take us to 5:30.
 13 MR. WEINSTEIN: But the cross is short.
 14 THE COURT: So I think we should go ahead
 15 with that.
 16 So the videographer can be setting up
 17 while Dr. Torres is removing his equipment.
 18 I will ask the Court reporter to take
 19 down the audio portion of this also.
 20 (Videotape testimony of Julius Richmond
 21 was played as follows:)
 22 Q. Plaintiffs will call as their first
 23 witness, Dr. Julius Richmond.
 24 There's a microphone there with the red
 25 light on it, if you'll get close to it.

1 If you have any problem with the
2 microphone, let me know.

3 Okay, sir. Go ahead.

4 Dr. Richmond, please tell the ladies and
5 gentlemen of the jury your full name and your
6 present professional address.

7 A. I'm Dr. Julius B. Richmond. I am
8 currently professor emeritus of health policy in
9 the department of social medicine at the Harvard
10 Medical School at 641 Huntington Avenue in Boston.

11 Q. Now, Dr. Richmond, at one time you were
12 Surgeon General of the United States of America; is
13 that correct?

14 A. That's correct.

15 Q. And when was that?

16 A. That was from 1977 to 1981.

17 Q. How does one become Surgeon General of
18 the United States in terms of the appointment
19 process; how does that work?

20 A. Well, ordinarily, the President of the
21 United States, through the secretary of the
22 Department of Health and Human Services, selects
23 the best person that they can find from around the
24 country. And nominates that person to the
25 Congress. And that's a presidential appointment.

1 Education and Welfare, which is also a presidential
2 appointment requiring confirmation by the Senate.

3 Q. To your knowledge, had anyone before you
4 or any Surgeon General since held that dual
5 appointment where you were both Surgeon General and
6 assistant secretary for health?

7 A. No, I'm the only one that held those
8 positions concurrently. Although there is a
9 proposal currently to again put these positions
10 together.

11 Q. I am, during the course of my questioning
12 you, obviously going to go through your curriculum
13 vitae beginning with medical school and taking you
14 through your training.

15 But let me ask you this, what was your
16 position and what medical school were you
17 affiliated with at the time you were appointed to
18 become Surgeon General of the United States?

19 A. I was a faculty member of the Harvard
20 Medical School and the Harvard School of Public
21 Health.

22 Q. Who notified you that you were under
23 consideration or were being considered for the
24 appointment as Surgeon General?

25 A. Well, I hadn't been aware of the fact

1 And requires confirmation by the Senate.

2 Q. So, in other words, after the
3 appointment -- and the President of the United
4 States during your tenure in office was who?

5 A. Jimmy Carter.

6 Q. And who was the -- I guess back then it
7 wasn't called the Department of Human Services, it
8 was called the Department of Health, Education and
9 Welfare?

10 A. That's correct.

11 Q. Who was the secretary during your tenure
12 of the Department of Health, Education and Welfare?

13 A. Joseph A. Califano.

14 Q. So after you were appointed by President
15 Carter, did the United States Senate have to
16 confirm you after hearings?

17 A. That's correct.

18 Q. And obviously you were confirmed?

19 A. That's correct.

20 Q. Now, in addition to your role and title
21 as Surgeon General of the United States, did you
22 have any additional designation in terms of your
23 role with the federal government?

24 A. Yes, I was also the assistant secretary
25 for health in the then Department of Health,

1 that I was being considered until I received a call
2 from Mr. Califano asking if I would come to
3 Washington to talk with him. Having served in
4 Washington at an earlier point in my career, I
5 didn't take such calls lightly, so I responded and
6 went to Washington.

7 Q. This is not a job you in any way
8 campaigned for, I take it?

9 A. No, I was not anticipating this position.

10 Q. Dr. Richmond, at one time you were the
11 director of the federal Head Start Program; is that
12 correct?

13 A. That's correct.

14 Q. Tell us first of all, what was -- what is
15 the Head Start Program?

16 A. The Head Start Program is a national
17 program for preschool children, particularly those
18 living in poverty. And as part of the programs of
19 the Office of Economic Opportunity, the war on
20 poverty, when that was established in 1965, I was
21 invited by the director of the Office of Economic
22 Opportunity, Mr. Shriver, to come to direct that
23 program.

24 It's a comprehensive program that
25 involves educational opportunities for preschool

1 children. And it's comprehensive because it
 2 includes health and dental care, nutritional
 3 services as well as social services, parent
 4 involvement.
 5 Q. Was that your first official job in
 6 Washington as part of the federal government?
 7 A. Yes.
 8 Q. And that began in 1965?
 9 A. '65.
 10 Q. That would have been part of the Johnson
 11 administration?
 12 A. Yes.
 13 Q. Let me back up and take you through your
 14 medical education background and training.
 15 Obviously I'm just going to hit some of the
 16 highlights.
 17 You became a medical doctor, got your MD
 18 degree in what year?
 19 A. 1939.
 20 Q. And from what institution?
 21 A. University of Illinois, College of
 22 Medicine in Chicago.
 23 Q. Now, at that point in time, did a
 24 physician who finished medical school, graduated
 25 medical school, got his MD degree, what was

1 training, which at that time was a year and a half
 2 rotating internship and at least two years of
 3 specialty training in an accredited Department of
 4 Pediatrics.
 5 And when I say accredited, that
 6 accreditation is provided by the American Board of
 7 Pediatrics as one of the many specialty boards in
 8 medicine.
 9 And after two years of practice, then one
 10 was eligible for examination by the board. And
 11 that is a board that's nationally constituted in
 12 contrast to the state boards of registration, which
 13 provide for certification for the practice of
 14 medicine.
 15 Q. I think most people obviously know,
 16 generally speaking, what a pediatrician is, but
 17 what is the technical definition of the specialty
 18 of pediatrics?
 19 A. Well, pediatrics is a specialty that
 20 deals with both trying to keep children well as
 21 well as trying to diagnose and treat the disorders
 22 of children. It places a great deal of emphasis on
 23 health promotion and disease prevention.
 24 Q. Does a pediatrician deal with basically
 25 all the diseases and problems that can happen to

1 necessary for you to do in terms of any internship
 2 or residency?
 3 A. Well, in those days we served a rotating
 4 internship. There were no specialized internships
 5 at that time. So I served that internship at the
 6 Cook County Hospital.
 7 Q. In Chicago?
 8 A. In Chicago. For a year and a half.
 9 And then was a pediatric resident to
 10 receive my specialty training in pediatrics at that
 11 hospital. That was interrupted by a period of
 12 service as a flight surgeon in World War II. From
 13 1942 to 1946.
 14 And then I came back, resumed my training
 15 and then became certified as a pediatrician.
 16 Q. Now, you say you became certified, you
 17 mean board-certified as a pediatrician?
 18 A. Yes. The American Board of Pediatrics.
 19 Q. Please explain to the jury how that works
 20 when someone completes a residency, a physician
 21 decides to specialize in a given area of medicine,
 22 what process must you go through before you become
 23 board-certified and what is the significance of
 24 being board-certified?
 25 A. Well, one has to take the specified

1 children across a wide spectrum?
 2 A. Yes, that is correct.
 3 Q. Now, let me discuss with you in part your
 4 teaching career. What did you do at the University
 5 of Illinois School of Medicine and during what time
 6 frame?
 7 A. Well, I joined the faculty following my
 8 residency, faculty at the University of Illinois,
 9 department of pediatrics. And I stayed there from
 10 1948 to 1953 and rose to be full professor of
 11 pediatrics, started out as an assistant professor.
 12 Q. And from the University of Illinois, when
 13 you left there, where did you go, to what other
 14 medical school?
 15 A. To the State University of New York,
 16 School of Medicine at the Upstate Medical Center in
 17 Syracuse, New York.
 18 Q. And what positions did you occupy there?
 19 A. I went there as professor and chairman of
 20 the department of pediatrics at that medical
 21 school. And for the last five years of my service
 22 there I also was dean of that school.
 23 Q. You were actually the dean of the medical
 24 school at Upstate Medical Center in Syracuse, the
 25 State University of New York for how many years?

1 A. Five years.

2 Q. And then when did you begin your
3 association with the Harvard Medical School?

4 A. I moved to the Harvard Medical School in
5 1971. I should say that it was in the interval
6 from '65 to '67 that I served in Washington in the
7 position as director of Head Start, on leave from
8 my position at the State University of New York,
9 Syracuse.

10 Q. Can everyone hear the doctor? Okay,
11 fine.

12 Now, in going down your curriculum vitae,
13 Dr. Richmond, it indicates you were professor and
14 chairman, department of preventive and social
15 medicine at the Harvard Medical School. Please
16 explain to the jury, at least in general terms,
17 what the department of preventive and social
18 medicine was all about. Its purpose, its function.

19 A. Well, the department of preventive and
20 social medicine, which I was asked to chair shortly
21 after I came to Harvard, is a department that
22 focused heavily on the prevention and disease --
23 the promotion of health and also social factors
24 that relate to health to observe what kinds of
25 impacts, for example, lives in poverty, had on

1 And simultaneously, I was the director of
2 the Judge Baker Children's Center, which is a
3 pioneering child guidance clinic for children
4 dealing with children with psychological and social
5 problems.

6 Q. Are you at the present time retired?

7 A. Well, no. I became emeritus because of
8 university statutes that requires you to become
9 emeritus.

10 Q. Explain what that means, the going to
11 emeritus status?

12 A. Well, the university relieves one, or it
13 can't now because of some of the new legislation,
14 but at age 70 it was required not that one stop
15 working, but that one become emeritus.

16 The designation of emeritus from the
17 university vantage point essentially meant that
18 they no longer provided a salary. So I've said to
19 my colleagues I became emeritus, but I didn't
20 retire, because I retained my offices and carried
21 on my usual activities.

22 I would say that with the title of
23 emeritus one is not required to perform any
24 specific functions, but I have continued to perform
25 them.

1 health, what kinds of impacts housing conditions,
2 poor sanitary conditions, all of the social issues
3 that we've come to know of as public health.

4 And that department was concerned in the
5 medical school with trying to help students
6 understand the importance of protecting the
7 public's health.

8 Q. At Harvard, what is the relationship
9 between the School of Public Health and the Harvard
10 Medical School itself?

11 A. Well, you could say they're separate, but
12 equal. They -- each of the schools is autonomous,
13 but there's obviously a great deal of interaction
14 among faculty members and a number of faculty
15 members -- and I was one of them -- would hold
16 positions on the appointments in both schools.

17 Q. So, if you would then, please summarize
18 for us the other positions you held, basically your
19 career at Harvard?

20 A. Well, I came initially to Harvard as
21 professor of child psychiatry and human
22 development. And that carried with it the clinical
23 appointment at the Boston Children's Hospital to
24 chair the department of psychiatry at that
25 children's hospital.

1 Q. And you went to emeritus status in what
2 year?

3 A. In 1988.

4 Q. Now, obviously in your curriculum vitae
5 you talk about hospital appointments and various
6 professional positions and honorary degrees. Now,
7 there's also a section about honors and awards.
8 Let me just ask you specifically about a few of
9 them.

10 The Sedgewick Medal of the American
11 Public Health Association, you received. Tell us
12 what that is.

13 A. Well, the American Public Health
14 Association is the association of professionals in
15 the field of public health. And they regard the
16 highest award that they make in that association as
17 the Sedgewick Medal for the person that they
18 believe has made the greatest contributions to the
19 field of public health.

20 Q. And what is the, if I'm pronouncing this
21 right, the Gustav Lenhard Award?

22 A. The Lenhard award is the award of the
23 Institute of Medicine of the National Academy of
24 Sciences. And I received the first of those
25 awards, which is recognition for having done the

1 most as the committee determines it for the
2 promotion of personal health services in the United
3 States.

4 Q. This next one will sound familiar to a
5 lot of people. The Ronald McDonald Award, which I
6 assume is awarded by McDonald's?

7 A. Well, it's their charitable arm. The
8 Ronald McDonald Children's Charities established an
9 award, again, to recognize people who have made
10 significant contributions for the health of
11 children. And I received the first of those
12 awards.

13 Q. And the John Holland Award?

14 A. The John Holland Award is awarded by the
15 American Pediatric Society. That's the senior
16 society of pediatric researchers in this country.
17 And that's the highest award that it makes. And
18 that's largely for what I did in pediatric
19 research.

20 Q. Now, doctor, there is in your curriculum
21 vitae a very lengthy list of your publications.
22 And obviously I'm not going to go -- there are over
23 200 of them. I'm not going to go through each and
24 every one, other than to ask you in a general way
25 to please tell the jury the names of some of the

1 Q. Does the field of public health include
2 the prevention of such diseases as lung cancer,
3 other cancers and heart disease?

4 A. Yes. Very much so.

5 Was issued during my tenure, was the
6 1979, on January 11th. That was the fifteenth
7 anniversary date to the day of the first Surgeon
8 General's Report, which Surgeon General Luther
9 Terry issued in 1964.

10 Q. Now, I'm going to return this book to
11 you. Before the Surgeon General's Report of 1979
12 was published, had you read every page in that
13 Surgeon General's Report?

14 A. Yes, I personally read every single word
15 of it.

16 Took a long time to read it, too.

17 Q. When did you read it?

18 A. Over my Christmas holiday, because I knew
19 it was to be published, we had to have it published
20 for that January 11th date.

21 Q. That was the target date, January 11,
22 '79?

23 A. Yes.

24 Q. Other than the preface that you wrote,
25 did you write personally any other chapters?

1 medical journals in which your articles have
2 appeared.

3 A. Well, my articles have appeared in
4 journals like Pediatrics, which is the official
5 publication of the American Academy of Pediatrics.
6 In pediatrics, in clinical cardiology, or
7 cardiology clinics. And in the American Journal of
8 Public Health and many other professional journals.

9 Q. Now, the field of public health, what
10 exactly is that?

11 A. Well, the field of public health is a
12 field which is designed to first understand the
13 causation of disease. And secondly to try to
14 arrive at methodologies for the prevention of such
15 disease. And then as a consequence of what we
16 learn from those kinds of studies, to try to
17 provide health promotional advice to the public,
18 that is, how they can maintain and improve their
19 health.

20 So it's the study of populations and
21 disease patterns in populations in order to better
22 understand and to provide better programs for
23 preventing disease and promoting health.

24 So it's the field which is dedicated
25 really to protecting the health of the public.

1 A. No, I did not personally write any other
2 chapters, but I read all of the reviews that
3 various experts around the country were generous
4 enough to provide us with.

5 Q. That was my next area of questioning.

6 How were the doctors who did write
7 individual chapters selected to write those
8 individual chapters? And secondly, before it was
9 decided that a given chapter would be included,
10 what process did it have to go through?

11 A. Well, initially, in developing the report
12 we would identify for each section of the report
13 the most authoritative person in the nation. And
14 that person would provide us with his best review
15 and recommendations, his or her best review and
16 recommendations.

17 And we then would select reviewers who
18 were unaffiliated in any professional way with the
19 primary authors. And ask those reviewers to give
20 us their best advice.

21 So when I said that I read the total
22 document, I also read the reviewer's comments and
23 then I sometimes with my staff would need to
24 rewrite or redevelop those chapters.

25 Q. Explain to the jury, if you would, what

1 is meant by the term and the concept of peer
2 review.

3 A. Peer review is the process that I
4 suggested, that when one develops a panel of
5 experts who are the best qualified professionally
6 in that field to provide their best critique or
7 criticism of that document. This is a time-honored
8 process in professional publications. That is, in
9 the respected professional publications that is the
10 way judgments are made about the publication of
11 articles.

12 So in addition, in this document to all
13 of the peer review I essentially then peer-reviewed
14 all of those documents. And what is in this
15 document carried my imprimatur as the final
16 reviewer.

17 Q. During opening statement, I told the jury
18 that one of our witnesses would be Dr. David Burns.
19 What role did Dr. David Burns play in the 1979
20 Surgeon General's Report?

21 A. Well, because of the complexity of
22 developing a document like this, I wanted to
23 identify the best professional person that I could
24 to help us do the planning and the assignment of
25 authors. And Dr. David Burns was generous enough

1 jury. We spent quite some time going over --
2 cut it off for a minute.

3 We spent quite a lot of time going over
4 this testimony. And I rule other objections
5 that the lawyers had. And for the most part
6 it was edited so that the parts that I deemed
7 were not relevant are taken out.

8 But a couple of times you'll see that
9 I'll just turnoff the sound because it wasn't
10 completely edited. When he turns off the
11 sound he's doing it on purpose.

12 (Video played.)

13 Q. I'm going to now hand you the Surgeon
14 General's Report of 1986, the title of which is the
15 Health Consequences of Involuntary Smoking, a
16 report of the Surgeon General. I may ask you some
17 specific questions.

18 Had you read this Surgeon General's
19 Report, the 1986 Surgeon General's Report?

20 A. Yes, I have.

21 Q. Did you, after having read it, did you
22 agree with its conclusions?

23 A. Yes, I did.

24 Q. Now, please go to the foreword by the
25 assistant secretary for health Dr. Windham, Roman

1 to drop what he was doing at that time at the
2 University of California and come to Washington and
3 help us in the development of this document.

4 Q. I notice in terms of the table of
5 contents it has many, many chapters. And the
6 authors of chapters are, of course, identified.
7 Look at chapters 11 and 13 and tell us the title of
8 those chapters and the name of the author.

9 I think at the table of contents at the
10 beginning, doctor.

11 A. I'm close to it here.

12 Chapter 10 you asked for first?

13 Q. Chapter 11.

14 A. Chapter 11, I'm sorry.

15 That's the chapter on involuntary
16 smoking.

17 Q. And who's the author of that?

18 A. I have to go to the first to get that.

19 Q. I don't think anyone would mind my
20 helping the doctor. It was Dr. Burns. And also --

21 A. Dr. Burns.

22 Q. And also Dr. Burns was the --

23 During --

24 (Video stopped.)

25 THE COURT: Let me explain this to the

1 Numeral VII in the bottom right-hand corner. It's
2 about the fourth page and the title is foreword at
3 the top.

4 A. Yes, yes, I have it.

5 Q. Now, go to the third paragraph on that
6 foreword page and follow along with me.

7 "The current report, the health
8 consequences of involuntary smoking examines the
9 evidence that even the lower exposure to smoke
10 received by the nonsmoker carries with it a health
11 risk. Use of the term involuntary smoking denotes
12 that for many nonsmokers exposure to ETS is the
13 result of an unavoidable consequence of being in
14 proximity to smokers. It is the first report in
15 the health consequences of smoking series to
16 establish a health risk due to tobacco smoke
17 exposure for individuals others than the smoker and
18 represents the work of more than 60 distinguished
19 physicians and scientists both in this country and
20 abroad. After careful examination of the available
21 evidence, the following overall conclusions can be
22 reached.

23 "Involuntary smoking is a cause of
24 disease in healthy nonsmokers.

25 Two, the children --"

1 "Simple separation of smokers and
2 nonsmokers within the same air space may reduce,
3 but does not eliminate exposure of nonsmokers to
4 environmental tobacco smoke."

5 Do you agree with everything I just read
6 or do you take issue with anything?

7 A. No, I think I would agree with those
8 conclusions.

9 Q. You're with me, doctor, on that page?

10 A. Yes, yes, indeed.

11 Q. "As a nation we have made substantial
12 progress in addressing the enormous toll inflicted
13 by active smoking. Efforts to improve and protect
14 individual health must be not only continued, but
15 strengthened. On the basis of the evidence
16 presented in this report, it is clear that actions
17 to protect nonsmokers from ETS exposure not only
18 are warranted, but are essential to protect the
19 public health."

20 As a specialist in the field of public
21 health and preventive medicine, do you agree or
22 disagree with that statement?

23 A. Oh, I agree with that statement very
24 much.

25 Q. Now, your deposition, you gave a

1 scientists from around the country are nominated by
2 committees of the National Academy of Sciences to
3 first as a committee to design a process of study
4 to do the study, to then publish its results after
5 having had that study peer-reviewed by scientists
6 from around the country.

7 Q. Now, Dr. Richmond, go, if you would, back
8 to the 1986 Surgeon General's Report and go to, at
9 the beginning, Roman numeral XI. And the heading
10 is, Public Health Policy and Involuntary Smoking.

11 A. Yes.

12 Q. And by the way, what I'm reading now is a
13 preface from the then Surgeon General of the United
14 States, G. Everett Koop; is that correct?

15 A. That's correct.

16 Q. So you're on page 11, Roman numeral?

17 A. That's correct.

18 Q. The bottom of the page where Dr. Koop
19 says as follows: "The 1986 Surgeon General's
20 Report on the health consequences of involuntary
21 smoking clearly documents that nonsmokers are
22 placed at increased risk for developing disease as
23 the result of exposure to environmental tobacco
24 smoke. Critics often express that more research is
25 required, that certain studies are flawed or that

1 deposition in this case where you were questioned
2 by lawyers, and I was present at that deposition
3 where you gave testimony. Other than this case,
4 have you ever testified in court before in a
5 litigated matter against the tobacco industry?

6 A. No, I have not.

7 Q. Now, Dr. Richmond, the National Academy
8 of Sciences is exactly what; what kind of
9 organization is that?

10 A. That is an organization which represents
11 people who have attained high scientific
12 achievement. It's an organization to which one
13 doesn't apply for membership, one has to be elected
14 to membership by one's scientific peer's.

15 Q. Is it in fact a national organization?

16 A. It represents the nation. It's chartered
17 by Congress to act in the public interest in areas
18 of science.

19 Q. In terms of the publications of the
20 National Academy of Sciences, is there a
21 peer-review process?

22 A. Yes, it's a very rigorous peer-review
23 process.

24 Q. And how does that work?

25 A. Essentially as I described before,

1 we should delay action until more conclusive proof
2 is produced.

3 "As both a physician and a public health
4 official, it is my judgment that the time for the
5 delay is past. Measures to protect the public
6 health are required now. The scientific case
7 against involuntary smoking as a health risk is
8 more than sufficient to justify appropriate
9 remedial action. And the goal of any remedial
10 action must be to protect the nonsmoker from
11 environmental tobacco smoke."

12 Do you agree with Dr. Koop?

13 A. Yes, I do.

14 Q. Now, Dr. Richmond, in terms of the time
15 that you have put in on this case in terms of
16 reviewing materials, going back and looking at
17 the -- your own Surgeon General's Reports, other
18 Surgeon General's Reports, reviewing the
19 Environment Protection Agency report. Give a
20 deposition, coming from Boston yesterday to Miami,
21 giving testimony today, what are you charging?

22 A. I'm not charging any fee. I'm not
23 charging any fee.

24 Q. Well, Dr. Richmond, based upon your
25 education, training and experience including your

1 career of patient care, teaching, your career in
2 public health and disease prevention, your service
3 as United States Surgeon General, do you have an
4 opinion based upon reasonable medical probability
5 as to whether breathing secondhand tobacco smoke in
6 airline cabins causes disease in nonsmoking flight
7 attendants?

8 A. Yes, I do.

9 Q. I'm asking you not about the risk, but
10 about whether it causes -- do you have an opinion
11 as to whether breathing secondhand smoke in
12 nonsmokers causes disease in nonsmokers?

13 A. Yes, I do. It does cause disease.

14 Q. Do you have an opinion based upon
15 reasonable medical probability as to which diseases
16 are caused from breathing in secondhand smoke?

17 A. Well, the diseases that relate to the
18 respiratory tract.

19 Irritations of the respiratory tract, in
20 adults, the exposure produces chronic respiratory
21 diseases.

22 Q. No further questions.

23 Q. Good afternoon, I introduced myself at
24 the break. My name is Walt Cofer. And I represent
25 Lorillard and Philip Morris. I have some questions

1 cabin air quality or its affect on flight
2 attendants, have you?

3 A. I haven't conducted any research, but I
4 have a lot of personal experience.

5 Q. Now, let's talk about airlines for a
6 second, because Mr. Rosenblatt brought out on
7 direct examination that while you were Surgeon
8 General, it was your position that cigarette
9 smoking should be prohibited on airplanes, correct?

10 A. That's correct.

11 Q. And basically, that is because you didn't
12 think nonsmokers wanted to sit next to smokers,
13 right?

14 A. That was one reason.

15 Q. And you figured that if smoking was
16 harmful to smokers then secondhand smoke was
17 probably not good for nonsmokers, right?

18 A. That's correct.

19 Q. You mentioned in response to one of the
20 earlier questions threshold. So I want to ask you
21 a few questions about that. Essentially that goes
22 to the old saying, "the dose makes the poison,"
23 correct? Generally speaking, it is true that the
24 amount of exposure to something is crucial in
25 determining the cause of anything, correct?

1 for you too, sir. I'm going to ask you, if you
2 would, please try to either speak into the
3 microphone or keep your voice up because it's hard
4 to hear.

5 Doctor, you were Surgeon General of the
6 United States Public Health Service in 1977 to
7 1981, correct?

8 A. That's correct.

9 Q. Your specialty is in childhood
10 development, pediatrics and child psychiatry; is
11 that right?

12 A. Yes.

13 Q. And you're board-certified in pediatrics?

14 A. That's correct.

15 Yes, I trained in medical school in
16 epidemiology and during the course of my career in
17 preventive and social medicine. I participated in
18 the teaching of epidemiology.

19 Q. In fact, other than the '79 Surgeon
20 General Report, which of course was put out when
21 you were Surgeon General, you have not published on
22 the subject of secondhand smoke at all, have you,
23 sir?

24 A. No, I have not.

25 Q. And you haven't conducted any research on

1 A. That's correct.

2 Q. Because there are some exposures that are
3 just so minimal you would not expect them to cause
4 disease?

5 A. That would be one possible conclusion.

6 Q. Well, let me give you some examples. For
7 example, can a flight attendant who flew one flight
8 where smoking was permitted, you wouldn't even
9 expect that exposure to cause disease, would you,
10 doctor?

11 A. I wouldn't expect that exposure to. But
12 I would anticipate that there could be cumulative
13 effects.

14 Q. But, now, you wouldn't expect -- do you
15 need water?

16 A. Yes.

17 Q. You would not expect one flight, one
18 exposure to cause a disease in flight attendants,
19 would you?

20 A. No.

21 Q. You don't know whether 10 flights would
22 cause disease, do you?

23 A. No, I don't know that.

24 Q. In fact, it's fair to say that you
25 wouldn't know how many flights would be enough,

1 right, doctor?

2 A. Well, there is a matter of response to
3 dose, what you were suggesting earlier. But along
4 with the exposure the more intense the exposure,
5 the more likelihood there is of causation.

6 Q. I understand that. My point is that
7 sitting here today the information you had, there's
8 no way you could pinpoint when that exposure
9 becomes enough, correct?

10 A. That's correct.

11 Q. Science recognizes the concept of
12 permissible exposure levels, I think as you refer
13 to in your Surgeon General's Report threshold
14 amount of values, right?

15 A. That's correct.

16 Q. In essence what that means is what we're
17 talking about, not every exposure causes disease,
18 correct?

19 A. That's right.

20 Q. Some exposure is just too small, right?

21 A. That's correct.

22 Q. Now, one of the studies that Mr. Cofer
23 mentioned was a study dealing with nonsmoking
24 passengers on airplanes. In terms of your
25 experience and knowledge, is there a difference

1 instead -- well, I'm going to excuse the jury,
2 but instead of staying now to go back into
3 Dr. Stammberger's deposition, I mean
4 testimony, I guess it was deposition, that we
5 could meet early tomorrow morning to do that.
6 So about --

7 MR. REILLY: Judge, I wouldn't bring this
8 jury back until noon tomorrow. You instructed
9 Mr. Weinstein to make some deletions based on
10 your rulings, but none of them have been made.
11 This is going to take some time.

12 THE COURT: Well, if they don't come back
13 until noon, it would be afternoon then. Tell
14 me what it looks like in terms of what's left
15 to do then.

16 MR. REILLY: We have Sands and Teef and
17 we have Coleman and Dr. Stammberger.

18 MR. JOHNSON: And Dr. Ogden's video from
19 Broin 1.

20 THE COURT: Doctor who?

21 MR. ENGRAM: Ogden.

22 THE COURT: Right. So what's tomorrow,
23 Thursday? Doesn't look good, then.

24 MR. REILLY: We're not going to finish
25 this week.

1 between nonsmoking passengers who may take a flight
2 every now and then and full-time, fully-employed
3 flight attendants?

4 A. Yes, there is a significant difference.

5 Q. Who has the greater exposure?

6 A. Well, the greater exposure is with those
7 who are flying in those cabins frequently, daily,
8 in the case of flight attendants.

9 (Video stopped.)

10 THE COURT: Is that it? Is that the end?

11 MS. WEINSTEIN: Yes, Your Honor. That's
12 the end of the tape.

13 THE COURT: So I guess that was just
14 about 45 minutes.

15 Does the Plaintiff rest subject to any of
16 the rulings that I still have to make?

17 MR. WEINSTEIN: Yes, except for the
18 interrogatories and the report, Surgeon
19 General's Report or excerpts, yes. Plaintiff
20 rests.

21 THE COURT: Okay.

22 Let me speak with the attorneys for a
23 minute about our schedule.

24 (A bench conference occurred as follows:)

25 THE COURT: I was thinking that

1 THE COURT: I don't think so.

2 Did you do anything about Stammberger or
3 do you still want to offer all of it?

4 MR. WEINSTEIN: I think it would help,
5 Judge, I'm just throwing this out to the
6 court --

7 THE COURT: I'm sorry to interrupt you
8 after I asked you a question, but it seems to
9 me the only possible way we might finish, and
10 even that is kind of iffy, is if the jury
11 could come back in the morning. If they come
12 back in the afternoon, there's no way we're
13 going to finish. So, no, I mean, we could
14 come at 8:00 or even quarter to 8:00 in the
15 morning and go over the rest of this
16 Stammberger testimony and the Ogden.

17 MR. REILLY: Judge --

18 THE COURT: But if it's going to take
19 hours to do it, then I guess we won't be able
20 to accomplish it. That's why I was asking if
21 you made any decisions about the rest of the
22 examinations.

23 MR. WEINSTEIN: No, then you've asked me
24 also I must say -- you asked me to go through
25 the Surgeon General's Report which I haven't

1 yet. I think it's supposed to shift the other
2 way.
3 THE COURT: Well, the Surgeon General's
4 Report, I mean, you know, I don't think that's
5 going to be as much of a problem because I
6 don't believe I'm going to let the whole thing
7 in. And the parts that have relevance I think
8 have been referred to by the witnesses. So I
9 don't think there's a need to let any other
10 part of it that's not already referred to by
11 the witnesses.
12 MR. WEINSTEIN: Well, in the report they
13 do talk about the irritation effect of many of
14 the chemicals in there, that is relevant.
15 THE COURT: Well, anyway, what about
16 Stammberger? Because that's the main thing.
17 MR. WEINSTEIN: Judge, the only way --
18 you're not going to like what I'm going to
19 say, as usual, I think it will save a lot of
20 time if Your Honor, if we come in a little
21 later and Your Honor gets the full thrust of
22 it by reading it first.
23 THE COURT: No, I don't want to read the
24 whole thing. I want to just address the
25 objections that you have.

1 crosses of all of the people who examined
2 Dr. Stammberger rather than just his own
3 cross, I can tell you we will be here for
4 hours.
5 THE COURT: Okay, if the jury comes back
6 in the afternoon, it looks like you'd be able
7 to finish with all the witnesses by Friday
8 afternoon, doesn't it? And then all we'd have
9 left would be closing, which I guess we'd have
10 to put off until Tuesday. I don't want to
11 have any witnesses left over.
12 MR. REILLY: You mean other than
13 Stammberger?
14 THE COURT: No, including Stammberger.
15 MR. REILLY: I'm telling you, Judge, as
16 long as it takes to argue these page and
17 lines, I don't know how -- honest to goodness,
18 I wish I could tell you how long --
19 THE COURT: What we'd do is we'd have the
20 morning to go over that argument, but in terms
21 of what's left, you have the witnesses you
22 mentioned including Stammberger and the Ogden.
23 Would it take more than?
24 MS. TEDDER: I think it would be very
25 hard to get all of these witnesses on by the

1 MR. WEINSTEIN: You've already gone
2 through Mr. Hunter if I recall; is that right,
3 Ken?
4 MR. REILLY: Yes.
5 MR. WEINSTEIN: So we only have mine, we
6 have Miles McGrane's is pretty short. I want
7 to have Mr. Gerson's cross.
8 MR. REILLY: Your Honor.
9 THE COURT: See, here's my problem. I
10 don't mind so much if we don't finish the case
11 this week. What can we do? But I do have a
12 real problem on Monday with an appointment
13 that I have no leeway about. And so really
14 what I could do is just, we can't really have
15 closing on Monday because all I'd have
16 available would be the morning and then
17 probably only a short time in the afternoon.
18 MR. WEINSTEIN: I don't have a problem
19 coming back on Tuesday.
20 THE COURT: That's the problem I have of
21 not finishing this week. I mean, you know, it
22 would be Tuesday probably.
23 MR. WEINSTEIN: That's all right.
24 MR. REILLY: Judge, if Mr. Weinstein
25 plans on actually arguing about all of the

1 close of Friday.
2 THE COURT: You do, a day and a half?
3 MR. REILLY: Stammberger takes -- the
4 direct takes about an hour. And I don't know
5 how long the cross is going to take. I mean,
6 all I'm saying is the time, that's all. If
7 the cross --
8 MR. WEINSTEIN: Judge, I could have had a
9 lot of objections to his. I only made one
10 objection to that Hoffman report. Now, if
11 he's got the objections, he could withdraw his
12 objections and we'll move along. He's
13 objected to every single cross examination.
14 THE COURT: I'm not talking about the
15 objections right now. I'm talking about
16 having all the testimony.
17 MR. REILLY: How long it's going to take.
18 It's going to take an hour for the direct of
19 Dr. Stammberger or thereabouts.
20 THE COURT: If all the cross were played,
21 how many hours is that?
22 MR. ENGRAM: Seven hours.
23 MR. REILLY: Eight hours.
24 THE COURT: Well, see, so there's no way
25 that we will -- we won't be able to get all

1 the witnesses in even.
 2 MR. WEINSTEIN: I don't think it takes
 3 that long.
 4 THE COURT: That's one thing that we know
 5 because it's on tape.
 6 MR. WEINSTEIN: But you struck some of
 7 it.
 8 THE COURT: So it's seven hours instead
 9 of eight hours.
 10 MR. REILLY: It's 350 pages. You're
 11 crazy. I don't mean to say --
 12 MS. WEINSTEIN: Disparaging counsel
 13 again. There's a motion in limine.
 14 MR. REILLY: His cross was half a day.
 15 THE COURT: Well, even if it's four
 16 hours --
 17 MR. REILLY: You can't possibly put
 18 everybody on between Thursday afternoon and
 19 Friday, they won't fit. We'd have to throw
 20 people up --
 21 MR. WEINSTEIN: I'll go through it again
 22 and look it over.
 23 THE COURT: Okay. If it goes over and
 24 you have some extra witnesses, we could do
 25 that Monday morning, that's not a problem. We

1 concluded this week.
 2 So we'll have a -- we will have a full
 3 day Friday. We will, if there are additional
 4 witnesses still to be called, which I think
 5 there will be, we will have them on Monday
 6 morning. However, we will not have a session
 7 Monday afternoon and we will have closing on
 8 Tuesday morning. That's the way it looks now.
 9 So it will go into next week, probably
 10 two days next week. But you won't have to be
 11 here all the full-time. You'll have tomorrow
 12 morning off at least to take care of some
 13 other matters that I'm sure are getting to be
 14 pretty pressing by now.
 15 But that's the way it appears and so
 16 that's the schedule that we'll follow. So it
 17 is a little late now, five to 6:00. We'll see
 18 the jury back at 1:30 tomorrow. Report to the
 19 usual place. Of course have your lunch before
 20 you report. We'll have a break in the
 21 afternoon.
 22 JUROR: Are we going to be like all day?
 23 We don't have to go to work tomorrow?
 24 THE COURT: Jurors always ask me what
 25 they have to do when they don't have to be

1 could do it Monday morning. But we could have
 2 no session in the afternoon and we'd have to
 3 have closing on Tuesday.
 4 MR. REILLY: I think that's probably what
 5 you have to do.
 6 THE COURT: Okay, I'm going to tell the
 7 jurors, they'll be thrilled.
 8 (The bench conference ended.)
 9 THE COURT: Okay. In terms of our
 10 timing, things are aren't looking quite as
 11 rosy as I was hoping.
 12 So this is what it looks like, instead of
 13 having you come in the morning and wait for
 14 us, there are many things that we still have
 15 to go over in relation to upcoming videotape
 16 testimony. So I'm going to meet with the
 17 lawyers starting pretty early tomorrow morning
 18 and we're going to take the morning to do
 19 that.
 20 So you do not have to be here all
 21 morning. You can come in the afternoon.
 22 Tomorrow is Thursday. So if you would report
 23 at 1:30. We'll have a full afternoon, but no
 24 morning session for the jury. However, what
 25 this means is that the case is not going to be

1 here, and it's up to you. All I know is you
 2 don't have to be here, you can work that out
 3 with your employer, I guess, or your
 4 conscience or whatever. So we'll see you
 5 tomorrow at 1:30 and thank you for your
 6 attention. Don't discuss the case.
 7 (Jury exits courtroom.)
 8 THE COURT: This will actually work out
 9 pretty well for my schedule. There's only one
 10 other thing we have to remember to schedule
 11 and that's a charge conference.
 12 So I don't know to what extent either
 13 side has prepared any special jury
 14 instructions or not based on the standard
 15 instructions, both sides have?
 16 MR. REILLY: I don't know about them, but
 17 we have.
 18 THE COURT: So we'll probably have to
 19 allow a substantial time for that.
 20 MR. REILLY: I don't know how long that's
 21 really going to take.
 22 THE COURT: My experience, charge
 23 conferences take quite a while.
 24 But one thing I would like is if you
 25 could exchange your charges and verdict forms,

1 even this -- by Friday, this week. Give me a
2 copy and exchange them. And then at least we
3 can look at them over the weekend and know
4 where we stand.

5 Okay, so now that we have a little more
6 time tomorrow, do you think we need to start
7 earlier?

8 MR. ENGRAM: Yes.

9 THE COURT: Okay, 8:00, start at 8:00
10 tomorrow to go over the rest of these.

11 MR. REILLY: Judge, one, I don't know
12 what they're talking about, I don't know
13 whether they're discussing this case, I doubt
14 they are, but it might be a good idea just to
15 admonish the jury panel one more time before
16 this thing is over that they shouldn't be
17 discussing the case among themselves.

18 THE COURT: Okay, I think I told them
19 just before they left. I try to remember to
20 tell them that.

21 Okay, so we'll meet at 8:00 here. See
22 you then.

23 (Trial adjourned at 6:00 p.m.)
24
25